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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 802

C. C. PEYTON, Superintendent of the Virginia State Penitentiary,

Petitioner,

—v.—

ROBERT ELMER ROWE and CLYDE MASON THACKER,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENTS

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March, 1968

INDEX

SUBJECT INDEX

	Page
Question Presented	1
Statute Involved	2
Statement	2
Summary of Argument	8
ARGUMENT:	
I. Federal Habeas Corpus Should Be Available to a Prisoner in State Custody to Secure Discharge From the Present Burdens of Unconstitutionally Imposed Sentences Scheduled for Future Service, and a Present Adjudication That He Cannot Be Held for Actual Service of Them	9
A. Rowe and Thacker need a present determination of their allegations that sentences were imposed upon them in violation of the Constitution in order to insure that they can obtain a full and fair fact-finding hearing	9
B. Refusal to hear a claim that a criminal judgment is unconstitutional until it actively prevents the prisoner's immediate release forces the prisoner to serve time under the conviction which he may now be able to show was imposed in violation of his constitutional rights	18
C. Outstanding future sentences impose restrictions within the prison system of the sort for which habeas corpus has been the traditional remedy. Length of sentence and number of convictions play a significant role in determining the amount of freedom any individual will have in prison and his eligibility for the various rehabilitative programs that lie at the heart of the modern penal system	20

Page

II. A State Prisoner Committed Under Consecutive Sentences Is Entitled to a Federal Habeas Corpus Hearing if Any of His Sentences Is Based Upon a Prima Facie Unconstitutional Conviction 25

A. The Great Writ is not limited by statute to those prisoners who assert an immediate right to complete release from all forms of custody whatsoever 33

B. A federal court has judicial power to award present relief in a habeas corpus proceeding from future unconstitutional imprisonment under an existing sentence 45

III. Prisoners With Presently Outstanding Sentences Which Must Be Served in the Future Have a Justiciable Controversy With the State Which Allegedly Violated Their Constitutional Rights in Obtaining the Convictions. If the Sentences Are Invalid They Are Entitled to Declaratory Relief Whether Habeas Corpus Is Available or Not 57

A. An independent basis for jurisdiction exists in the Civil Rights Act, 28 U.S.C. § 1343, which confers power on the federal courts to protect the full range of Fourteenth Amendment rights 60

B. Rowe and Thacker have a clearly justiciable controversy with Virginia over the constitutional validity of judgments imposed upon them by that state. Their controversy becomes less ripe with the passage of time, which may ultimately moot the dispute 62

Page

C. The federal courts have the power to declare the rights of Rowe, Thacker and the Commonwealth of Virginia. That power should be exercised when the interests of Rowe, Thacker, the Commonwealth of Virginia and the United States are best served by an immediate determination of the controversy 65

IV. The Constitutionality of Sentences Imposed by a State Is Never a Merely Academic Question Since the State Now and Forever Asserts the Right to Treat the Sentence as a Valid Basis for State Action 70

Conclusion 73

APPENDIX:

Federal Habeas Corpus Legislation 75

CITATIONS:

Aetna Cas. & Sur. Co. v. *Quarles,* 92 F.2d 321 (4th Cir. 1937) 58, 65
Aetna Life Ins. Co. v. *Haworth,* 300 U.S. 227 (1937) 62, 63, 64
Arketa v. *Wilson,* 373 F.2d 582 (9th Cir. 1967) 32

Benson v. *California,* 328 F.2d 159 (9th Cir. 1964) 31
Boardman v. *Boardman;* 135 Conn. 124, 62 A.2d 521 (1948) 30
Boles v. *Stevenson,* 379 U.S. 43 (1964) 50
Brillhart v. *Excess Ins. Co.,* 316 U.S. 491 (1942) 65
Brown v. *Allen,* 344 U.S. 443 (1953) 10, 30
Brownell v. *Tom We Shung,* 352 U.S. 180 (1956) 30

Case v. *Nebraska,* 380 U.S. 924 (1965) 55
Case v. *Nebraska,* 381 U.S. 336 (1965) 55, 56
Clark v. *Memolo,* 174 F.2d 978 (D.C. Cir. 1949) 59
Commonwealth ex rel. Stevens v. *Myers,* 419 Pa. 1, 213 A.2d 613 (1965) 16, 68

Page

Darr v. *Burford*, 339 U.S. 200 (1950) 29
Davis v. *North Carolina*, 384 U.S. 737 (1966) 50

Ellis v. *United States*, 356 U.S. 674 (1958) 13
Ex parte Hull, 312 U.S. 546 (1941) 30, 43
Ex parte McCardle, 6 Wall. 318 (1868) 36

Fay v. *Noia*, 372 U.S. 391 (1963) ..... *passim*
Foraker v. *Virginia*, No. 9950 (4th Cir. Dec. 9, 1966) 60
Forsythe v. *Ohio*, 333 F.2d 678 (6th Cir. 1964) 59

Hague v. *CIO*, 307 U.S. 496 (1939) 61
Heflin v. *United States*, 358 U.S. 415 (1959) 29
Holiday v. *Johnston*, 313 U.S. 342 (1941) 28, 29, 30
Howard v. *Smyth*, 365 F.2d 428 (4th Cir.), *cert. denied*, 385 U.S. 988 (1966) 21
Hudson v. *Youell*, 179 Va. 442, 19 S.E.2d 705 (1942) 10
Hurley v. *Lindsay*, 207 F.2d 410 (4th Cir. 1953) 59
Hurley v. *Reed*, 282 F.2d 844 (D.C. Cir. 1961) 58, 59

In re Bonner, 151 U.S. 242 (1894) 30
In re Chapman, 43 Cal.2d 385, 273 P.2d 817 (1954) 68, 71
In re Medley, 134 U.S. 160 (1890) 50

Jackson v. *Denno*, 378 U.S. 368 (1964) 50, 51
Jones v. *Cunningham*, 371 U.S. 236 (1963) .....*passim*

Kozol v. *Lumbermens Mut. Cas. Co.*, 201 F. Supp. 718 (D. Mass. 1962) 65

Landman v. *Peyton*, 370 F.2d 135 (4th Cir. 1966), *cert. denied*, 388 U.S. 920 (1967) 21
Lehigh Coal & Nav. Co. v. *Central R.R.*, 33 F. Supp. 362 (E.D. Pa. 1940) 57

Martin v. *Virginia*, 349 F.2d 781 (4th Cir. 1965) 27, 32, 34, 63
Mathis v. *United States*, 369 F.2d 43 (4th Cir. 1966) 18

Page

McNally v. *Hill*, 293 U.S. 131 (1934) .....*passim*
Miley v. *Lovett*, 193 F.2d 712 (4th Cir. 1952) 59
Monroe v. *Pape*, 365 U.S. 167 (1961) 61, 67
Muskrat v. *United States*, 219 U.S. 346 (1911) 63
Norris v. *Alabama*, 294 U.S. 587 (1935) 68
Parker v. *Ellis*, 362 U.S. 574 (1960) 18, 39, 49, 62, 73
Perkins v. *Peyton*, 369 F.2d 590 (4th Cir. 1966) 43
Peyton v. *Williams*, 206 Va. 595, 145 S.E.2d 147 (1965) 10, 43, 47, 53
Pierce v. *Society of Sisters*, 268 U.S. 510 (1925) 49, 53
Public Affairs Associates, Inc. v. *Rickover*, 369 U.S. 111 (1962) 65
Ragan v. *Commandant*, 290 F.2d 132 (10th Cir. 1961) 58
Rex v. *Clarkson*, 1 Str. 444, 93 Eng. Rep. 625 (K.B. 1722) 29
Rex v. *Delaval*, 3 Burr. 1434, 97 Eng. Rep. 913 (K.B. 1763) 29, 39, 40
Robinson v. *California*, 370 U.S. 660 (1962) 25
Rogers v. *Richmond*, 365 U.S. 534 (1960) 49, 51
Sanders v. *United States*, 373 U.S. 1 (1963) 16
Schilling v. *Rogers*, 363 U.S. 666 (1960) 61
Shaughnessy v. *United States ex rel. Mezei*, 345 U.S. 206 (1953) 30
Shell Oil Co. v. *Frusetta*, 290 F.2d 689 (9th Cir. 1961) 65
Sheppard v. *Maxwell*, 384 U.S. 333 (1966) 50, 51
Simon v. *Director*, 235 Md. 626, 201 A.2d 371 (1964) 68
Society of Sisters v. *Pierce*, 296 F. 928 (D. Oregon 1924) 49
State ex rel. Goodchild v. *Burke*, 27 Wis. 2d 244, 133 N.W. 2d 753 (1965) 68
State ex rel. Holm v. *Tahash*, 272 Minn. 466, 139 N.W. 2d 161 (1965) 68

Page

State v. *Losieau*, 180 Neb. 696, 144 N.W. 2d 435 (1966) 68

Townsend v. *Sain*, 372 U.S. 293 (1963) 10, 17, 18, 19, 56, 69, 70
Tucker v. *Peyton*, 357 F.2d 115 (4th Cir. 1966) 18, 31
Turner v. *Maryland*, 303 F.2d 507 (4th Cir. 1962) 11
Turner v. *Maryland*, 318 F.2d 852 (4th Cir. 1963) 11
Twiford v. *Peyton*, 372 F.2d 670 (4th Cir. 1967) ..12, 69

United Public Workers v. *Mitchell*, 330 U.S. 75 (1947) 63
United States ex rel. LaNear v. *LaVallee*, 306 F.2d 417 (2d Cir. 1962) 32
United States ex rel. Steinberg v. *Graham*, 57 F. Supp. 938 (E.D. Ark. 1944) 30
United States ex rel. Watson v. *Myers*, 250 F. Supp. 292 (E.D. Pa. 1966) 31
United States v. *Mason*, 344 F.2d 673 (2d Cir. 1965) 50, 51
United States v. *Moore*, 166 F.2d 102 (7th Cir.), *cert. denied*, 334 U.S. 849 (1948) 67
United States v. *Pridgeon*, 153 U.S. 48 (1894) 41, 42, 43
United States v. *Rockower*, 171 F.2d 423 (2d Cir. 1948), *cert. denied*, 337 U.S. 931 (1949) 67
United States v. *United States Fid. & Guar. Co.*, 309 U.S. 506 (1940) 70

Waldon v. *Iowa*, 323 F.2d 852 (8th Cir. 1963) 59, 66
Walker v. *Johnston*, 312 U.S. 275 (1941) 54
Washington v. *Hagan*, 287 F.2d 332 (3d Cir. 1960) 59
Williams v. *Ball*, 294 F.2d 94 (2d Cir. 1961), *cert. denied*, 368 U.S. 990 (1962) 65
Williams v. *Peyton*, 372 F.2d 216 (4th Cir. 1967) 15, 27, 63-64, 67

Young v. *Ragen*, 337 U.S. 235 (1949) 67

Page

CONSTITUTIONS AND STATUTES:

Constitution of the United States

Article III 46, 62
Fifth Amendment 56
Eighth Amendment 25
Fourteenth Amendment 55, 60, 61

United States Statutes

Judiciary Act of Sept. 24, 1789, c. 20, § 14 1 Stat. 81, 82 ..... 35, 36, 37
Act of February 5, 1867, ch. 28, 14 Stat. 385 ..36, 37
Title 13, Revised Statutes of 1874, §§ 751-766 ..... 37, 38, 42
28 U.S.C. § 761 (1925) 37
28 U.S.C. § 1343 ..... 60, 61
28 U.S.C. §§ 2201, 2202 ..... 47, 49, 57, 58, 61, 64, 65, 74
28 U.S.C. § 2241 ..... 2, 26, 55, 56
28 U.S.C. § 2243 (1964) 37, 54
28 U.S.C.A. § 2244 (Supp. 1967) 16, 19, 70
28 U.S.C. § 2253 19
28 U.S.C.A. § 2254 (Supp. 1967) 2, 19, 66
42 U.S.C. § 1983 61

State Statutes

Col. Rev. Stat. § 39-13-1 (1964) 73
Md. Ann. Code Art. 27, § 645 A (1967) 68
Or. Rev. Stat. § 138.510 (1967) 68
Va. Code Ann. § 19.1-294 (1960) 10
Va. Code Ann. §§ 53-20 to 53-128 (1967) 21
Va. Code Ann. § 53-207 (1967) 47
Va. Code Ann. §§ 53-251, 53-252 (1967) 4, 27, 44
Va. Code Ann. § 53-278.1 (1967) 14
Va. Code Ann. § 53-296 (1967) 73

Statute of Other Jurisdictions

Habeas Corpus Act of 1679, 31 Car. 2, c. 2 ....38, 39

Page

MISCELLANEOUS:

American Bar Association Project on Minimum Standards for Criminal Justice, *Sentencing Alternatives and Procedures* (Tent. Draft 1967) ..72, 73
American Bar Association Project on Minimum Standards for Criminal Justice, *Standards Relating to Post-Conviction Remedies* (Tent. Draft 1967) 17, 18, 51, 52
American Correctional Association, *Manual of Correctional Standards* 262 (1954) 22
Borchard, *Declaratory Judgments* 299 (2d ed. 1941) 66
Cong. Globe, 39th Cong., 1st Sess. 4151 (1867) 36
Division of Corrections, Virginia Department of Welfare and Institutions, *Classification in the Virginia Penal System* (1950) 21
Glasser, *The Effectiveness of a Prison and Parole System,* ch. 4 (1964) 24
Johnson, *Crime, Correction, and Society* 523 (1964) 23, 25
Korn and McCorkle, *Criminology and Penology* 479 (1959) 23
Loveland, *Classification in the Prison System,* in *The Sociology of Punishment and Correction* 189 (1962) 20, 21
Loving, Stockwell, and Dobbins, *Characteristics of Escapees,* in *The Sociology of Punishment and Correction* 144 (1962) 21
President's Commission on Law Enforcement and the Administration of Justice, *Task Force: Corrections* (1967) 73
President's Commission on Law Enforcement and the Administration of Justice, *Task Force: The Courts* (1967) 16-17
Richmond, *Prison Profiles* 14 (1965) 22
Tappan, *Crime, Justice and Correction* 470 (1960) 25
United States Dept. of Justice, *National Prisoner Statistics* 12 (1966) 71

Page

LAW REVIEWS:

Farber, *Suffering and Time Perspective of the Prisoner,* 20 University of Iowa Studies in Child Welfare 155 (1944) 25
Pugh, *The Federal Declaratory Remedy: Justiciability, Jurisdiction and Related Problems,* 6 Vand. L. Rev. 79 (1952) 62
Note, *Revival of the Eighth Amendment: Development of Cruel-Punishment Doctrine by the Supreme Court,* 16 Stan. L. Rev. 996 (1964) 25
Note, *Civil Disabilities of Felons,* 53 Va. L. Rev. 403 (1967) 73
Note, *Habeas Corpus, Custody and Declaratory Judgment,* 53 Va. L. Rev. 673 (1967) 17, 58, 59, 63

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ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS

Question Presented

A state prisoner is incarcerated under consecutive sentences. He has alleged facts which, if true, render one of his convictions unconstitutional. The conviction attacked adversely affects his treatment in prison, and evidence to prove his allegations is disappearing with the passage of time. According to a state administrative rule for deter-

mining the order of sentence service, he has not yet begun serving the sentence based upon the attacked conviction, and therefore no state remedy is available. Is he presently entitled to a federal hearing and adjudication upon his claim?

Statute Involved

The statute involved in this case is 28 U.S.C. § 2241 (1964), which is set forth in the Appendix to this brief. 28 U.S.C. § 2254, set forth in Brief for Petitioner, 3, is not involved in this case.

Statement

C. C. Peyton v. *Robert Elmer Rowe*

Robert Rowe was tried on May 20, 1963 for rape in Staunton, Virginia. On June 18, 1963 he was sentenced to thirty years in prison for that offense. Three days later he was brought before the Circuit Court in the adjoining City of Waynesboro, Virginia to be tried on an indictment for feloniously abducting a female with intent to defile her. This charge arose from the same incident and involved the same complainant. On June 24, 1963, the court heard and dismissed a plea of former jeopardy. Rowe's counsel then advised him to plead guilty since any "sentence imposed would have to be run concurrent" (R. I, 6) with the sentence imposed six days earlier for rape. Acting upon this advice Rowe pleaded guilty to the abduction charge. The court then sentenced him to twenty years in the penitentiary to be served consecutively. No appeal was taken. The aggregate sentence imposed on Rowe was thus fifty years.

He will commence service of the second sentence in 1993. (A. 9) If he receives the full good-time credit on his first sentence, he will begin service of the second sentence in September, 1982. (R. I, 37). He will become eligible for parole in November 1974 (R. I, 36). If the second sentence were to be declared invalid, he would be eligible for parole in late 1970 or early 1971 (A. 9). Rowe will be thirty-one years old this month.

Rowe's claims of double jeopardy, involuntary guilty plea, defective indictment and ineffective representation based on this second trial (R. I, 6) were rejected without a hearing on April 27, 1966, by the Supreme Court of Appeals of Virginia, to which he had applied for a writ of habeas corpus (A. 1). The court's order was premised on his nonservice of the attacked second sentence:

> [T]he petitioner is not now detained in pursuance to the judgment of which he complains, and the writ of habeas corpus lies only to attack the validity of petitioner's present detention.

(A. 1).

The United States District Court for the Western District of Virginia denied Rowe's petition for a writ of habeas corpus on October 26, 1966 on the ground of prematurity, citing *McNally* v. *Hill,* 293 U.S. 131 (1934). (A. 3).

Rowe contended in both courts that there was jurisdiction to hear his claim that the second judgment entered six days after the sentence for rape was unconstitutional. (R. I, 16, 28). "Should your petitioner have to wait for such a term that all means of proof of unrecorded matters of fact in former judicial proceedings are unavailable?" (R. I, 18). When the Supreme Court of Appeals of Virginia answered this question in the affirmative, Rowe argued in the federal

District Court that he had been denied due process by Virginia's failure "to afford some adequate corrective process for the hearing and determination of claims of violation of federal constitutional guarantees." (R. I, 7).

The United States Court of Appeals for the Fourth Circuit granted a certificate of probable cause, appointed counsel and consolidated the case for briefing and argument with *Thacker* v. *Peyton*. The cases were heard by an *en banc* court. Unanimously, on August 28, 1967, the Fourth Circuit reversed the district courts and remanded for the hearings on the merits which Virginia conceded were required by the allegations.

Virginia's petition for certiorari was granted on January 17, 1968 and the case was set down for argument by this Court after No. 71. Virginia concedes that if the remedy of habeas corpus is available both prisoners are entitled to plenary hearings and raises no question of exhaustion of state remedies. (Brief for Petitioner, 6, 7).

C. C. Peyton v. *Clyde Mason Thacker*

Clyde Thacker was committed to the Virginia State Penitentiary on November 13, 1964, (R. III, 2), to serve a number of sentences totalling sixty years, four months and sixteen days. (R. III, 4). With credit for good time Thacker is due to be released on November 8, 2004. (R. III, 4). Since every prisoner is eligible for parole after twelve years if one-fourth of his term is in excess of that time, VA. CODE ANN. § 53-251 (1967), he will become eligible for parole on August 7, 1976. (R. III, 2). The three sentences which he seeks to attack were imposed at the same time in 1953. Their invalidation would not make him eligible for parole nor advance his parole eligibility date. These sentences

are scheduled to run from July 8, 1994 to July 8, 2004. If he does not receive good-time credit, the sentences will begin in 2009 and run to 2024. (R. III, 4). Thacker is now thirty-eight years old.

The offenses for which these three sentences were imposed took place in 1950, 1951 and 1952. (R. III, 7). Thacker was indicted on three separate counts of housebreaking by a grand jury in Hanover County, Virginia, and arrest warrants dated July 6, 1952, (R. III, 17), were issued on two of the offenses. The record does not reveal when the warrants were served, but there is in the record a presentence report on Thacker relating to other offenses, dated June 20, 1952, which indicated that Thacker was in custody at least at that point. (R. III, 15). A later presentence report, dated September 18, 1953, and filed in the Hanover County Circuit Court on November 16, 1953, showed that as of May, 1953, Thacker had been in prison long enough for a fairly detailed prison progress report to be filed. (R. III, 7). The presentence reports also show that Thacker left school at the age of sixteen, when he was still in the third grade, since he said he was unable to learn and had to go to work. (R. III, 13).

Counsel was appointed to represent Thacker on the three housebreaking charges which he seeks to attack on June 24, 1953. (R. II, 10). Thacker pleaded guilty to the three charges on the same day on the advice of his counsel. Counsel, whose name Thacker does not remember, advised him to plead guilty "since it would eliminate the necessity of subpoenaing defense witnesses and, also, would save the court the expenses involved in a costly trial—and that it wouldn't make much difference since your petitioner was already under other sentences from other courts." (R. II,

10). Counsel advised Thacker that the sentences would be suspended.

Three consecutive five-year sentences were imposed on November 16, 1953. The court then suspended "execution of sentence in this case for 50 years upon the condition that he be of good behavior while he is in the State Penitentiary serving a sentence imposed on him by another Court and upon the further condition that he be of good behavior, after he is released from the Penitentiary, and not violate any of the laws of this Commonwealth during the term of his probation." Thacker only saw his court-appointed counsel twice—on the day of his trial, June 24, 1953 and the day of sentencing, November 16, 1953.

On March 19, 1956, the suspension of the three five-year sentences was revoked at a hearing at which Thacker was not represented by counsel.

Thacker did not seek state habeas corpus to attack these sentences. He states in his petition to the United States District Court for the Eastern District of Virginia that he "has been advised that he cannot attack these sentences in the courts of the Commonwealth until he starts serving them (July 9, 1994)." (R. II, 10). In response to Superintendent Peyton's answer, Thacker further stated:

> This Honorable Court surely is aware that—to quote the respondent's words in a similar case filed by petitioner in the Supreme Court of Appeals of Virginia—"In Virginia, the writ of habeas corpus cannot be used to attack a sentence to be served in the future. See *Peyton* v. *Williams,* 206 Va. 595—1965."

(R. II, 16).

The federal district judge did not base his February 1, 1967 denial of the writ on Thacker's alleged failure to

exhaust state remedies, but on the fact that Thacker was not serving the sentences and they did not affect his parole eligibility. (A. 6).

In a memorandum filed in the Fourth Circuit Thacker said:

> (3) If there is any equality in the law—if there is any substance to the Constitutional phrase "EQUAL PROTECTION OF THE LAW"—if there is such a thing as HONEST JUSTICE—then, surely, the United States Government should not allow the Commonwealth of Virginia to sentence your appellant, nor anyone else, illegally and unconstitutionally, to a term to begin in July, 1994, without providing some method for attacking the validity of such sentences until July, 1994. In essence, that is exactly what the Honorable Judge John D. Butzner, Jr., stated in his ORDER dated February 1, 1967: "FOR REASONS STATED IN THE MEMORANDUM OF THE COURT THIS DAY FILED, IT IS ADJUDGED AND ORDERED THAT THE WRIT OF HABEAS CORPUS IS DENIED AND THE PETITION IS DISMISSED WITHOUT PREJUDICE TO PETITIONER'S REAPPLICATION AT THE PROPER TIME."
>
> According to that MEMORANDUM, the PROPER TIME would be on or about July 9, 1994.
>
> This is not only unjust. It is RIDICULOUS! It is repugnant to the American concept of JUSTICE. Would it be legal and just for a doctor to deny treatment of syphilis to a patient until 1994 merely because the patient also had tuberculosis and the doctor estimates it would take until 1994 to cure the tuberculosis? The same principle applies here.
>
> Your appellant contends there is nothing in the United States Constitution and the Bill of Rights

> whereby any State is given the authority to impose a sentence upon a person, such sentence to start twenty-seven years in the future, or even two years in the future, without providing some method for testing the legality and validity of the sentence. Although this practice is quite common in the Courts of the Commonwealth of Virginia, wherein sentences cannot be attacked by habeas corpus, it always has been common opinion that such sentences could attacked by habeas corpus in the federal Courts. Here the Honorable Judge John D. Butzner, Jr., ruled to the contrary.

(R. IV, 43, 44).

Virginia does not allege here that Thacker has not exhausted his state remedies and concedes that his allegations demonstrate that he is entitled to a hearing. (Brief for Petitioner, 6, 7).

Summary of Argument

Rowe and Thacker are in prison. They assert that sentences imposed upon them in 1963 and 1953, respectively, are unconstitutional and the Commonwealth agrees that their allegations are such as to entitle them to a hearing in federal court. The Commonwealth asserts the right to treat these sentences as valid for all purposes, including the determination of prison treatment, the computation of parole eligibility, and the requirement of actual service. Establishing the invalidity of these sentences necessitates a fact-finding determination. *McNally* v. *Hill,* which requires postponement of this fact-finding hearing and determination until after 1990 for each man, incorrectly held that a sentence scheduled for future service cannot be an

intolerable restraint within the reach of habeas corpus. The Great Writ then and now is not a narrow, static formalistic remedy available only when complete discharge from all custody can be demanded, but a remedy for granting that form of discharge from custody which law and justice require. Even construed narrowly the Great Writ is available to secure an immediate adjudication that the state's presently asserted right to continue confinement in the future is invalid. The Fourth Circuit therefore correctly ruled that the district courts, if they determine that Rowe's and Thacker's sentences are unconstitutional, may order the warden to expunge the sentences, to give no further effect to them, and to discharge Rowe and Thacker now and forever from any restraint flowing from them.

ARGUMENT

I.

Federal Habeas Corpus Should Be Available to a Prisoner in State Custody to Secure Discharge From the Present Burdens of Unconstitutionally Imposed Sentences Scheduled for Future Service, and a Present Adjudication That He Cannot Be Held for Actual Service of Them.

A. Rowe and Thacker Need a Present Determination of Their Allegations That Sentences Were Imposed Upon Them in Violation of the Constitution in Order to Insure That They Can Obtain a Full and Fair Fact-Finding Hearing.

Respondents Rowe and Thacker are in the Virginia State Penitentiary in Richmond, Virginia. They seek to attack sentences which they allege were imposed in violation of the Constitution of the United States. The Commonwealth of Virginia candidly concedes that their allegations are such

that each of them would be entitled to a hearing in a federal district court on the merits of his claim if he were presently serving one of the attacked sentences. However, Virginia correctly maintains that as long as *McNally* v. *Hill,* 293 U.S. 131 (1934) remains the law neither man will be eligible to have this federal[1] factual hearing until sometime in the last decade of the Twentieth Century when they actually began service of the prima facie unconstitutional sentences.

Resolution of the allegations of each respondent necessitates trial of issues of fact in the sense of *Townsend* v. *Sain,* 372 U.S. 293, 309 n. 6 (1963):

> By "issues of fact" we mean to refer to what are termed basic, primary, or historical facts: facts "in the sense of a recital of external events and the credibility of their narrators. . . . " *Brown* v. *Allen,* 344 U.S. 443, 506 (opinion of Mr. Justice Frankfurter).

Robert Rowe has alleged that after being tried for rape in Augusta County, he was placed on trial for abduction with intent to defile in Waynesboro and that upon the second trial his attorney, after unsuccessfully pleading double jeopardy, advised him to plead guilty to the abduction charge because "irregardless whether petitioner was convicted or not, the sentence imposed would *have to be run concurrent* with a prior sentence imposed by the Circuit Court of Augusta County for rape." (R. I, 6; emphasis added). This was a clear misstatement of Virginia law. See VA. CODE ANN. § 19.1-294 (1960); *Hudson* v. *Youell,* 179 Va. 442, 19 S.E.2d 705 (1942). In reliance on this ad-

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[1] Since Virginia presently follows its version of the *McNally* rule, no state post-conviction remedy will be available either. *Peyton* v. *Williams,* 206 Va. 595, 145 S. E. 2d 147 (1965); *Rowe* v. *Peyton,* A. 1-2 (1966).

vice, Rowe pleaded guilty, ignorant not merely of the fate which awaited him when the court gave him a twenty-year sentence to run consecutively with his prior sentence, but totally ignorant that there was any possibility he could receive such a sentence. If these allegations can be sustained, the entry of a conviction upon Rowe's guilty plea was a clear and grave denial of due process of law.

Normally a claim of ineffective representation by counsel is a very difficult one to make out. See, *e.g.*, *Turner* v. *Maryland*, 318 F.2d 852, 854 (4th Cir. 1963). But Robert Rowe has alleged his counsel was so ineffective that his very "assistance" created the conditions which long ago were held to render the entertainment of a guilty plea a deprivation of due process. It may be that Rowe will not be able to sustain these allegations. But as the Fourth Circuit's two decisions in *Turner* v. *Maryland*, 303 F.2d 507 (4th Cir. 1962), and 318 F.2d 852 (4th Cir. 1963), demonstrate, the issue of effective assistance of counsel is a complex factual question, and where substantial allegations are presented, the claim must be heard on the merits.

This clear need for a factual hearing to determine whether Rowe can sustain his allegations points up the urgent necessity that a present remedy be provided. The case turns almost entirely upon the exact nature of the advice his attorney gave Rowe prior to his guilty plea at his second trial. Twenty-five years from now, when Rowe enters upon his second sentence, the attorney who represented him may be dead; certainly his memory of the crucial conversation will not be rendered any sharper by the passage of time. Thus upon the availability of some present remedy depends not only Rowe's right to his freedom and the state's power to keep him in prison, but also

possible vindication of the reputation of a member of the bar. The case should be heard on its merits and it should be heard now, before it becomes too late.

Clyde Thacker has alleged that when he was tried in 1953 upon three indictments for housebreaking, a lawyer was appointed to represent him on the day of the trial. Thacker was then less than twenty-four years old, and had left school at the age of sixteen, having never finished the third grade. (R. III, 13). His court-assigned counsel advised him to plead guilty because it would save time and money all around and because "it wouldn't make much difference since your petitioner was already under other sentences from other courts," (R. II, 10), and because the attorney could get the sentences suspended. One component of Thacker's claim that the three resulting sentences are unconstitutional is that counsel was appointed to represent him on the same day he was tried. The Fourth Circuit has unequivocally condemned the "deplorable" but then apparently widespread practice in Virginia of appointing counsel for indigent persons accused of felonies too late to permit adequate investigation and trial preparation. These practices

> are inherently prejudicial, and a mere showing of them constitutes a *prima facie* case of denial of effective assistance of counsel, so that the burden of proving lack of prejudice is shifted to the state.

Twiford v. *Peyton*, 372 F.2d 670, 673 (4th Cir. 1967).

One factor which motivated the decision in *Twiford* was "an unnecessary and an unexplained delay between incarceration and the appointment of counsel [giving] rise to a substantial possibility of prejudice." *Ibid.* The record does not make it clear when Thacker was incarcerated, but his

prison record indicates that his first sentence was imposed in June, 1952 (R. III, 5), a full year before the trial in this case, and the presentence report refers to a detailed progress report filed by prison officials in May, 1953 (R. III, 15), so the inference is reasonably clear that Thacker was in the custody of the Commonwealth of Virginia for at least a year before his trial upon the three housebreaking charges. Yet counsel was not appointed until the day of the trial, which itself came more than two years after one of the alleged crimes. Counsel, without opportunity for investigation, testing the strength of the state's case, or trial preparation, advised an ignorant and unlettered youth to plead guilty. The Commonwealth's case against Thacker has never been developed before a trier of fact. Thacker could not judge his chances of success. His attorney had precious little time to do so. The Commonwealth may be able to show that Thacker was not prejudiced, but it should be required to bear its burden of proof in a full hearing upon the facts.

The claim of ineffective representation has another component. This Court has made it clear that an indigent is entitled to a lawyer who is an advocate in the fullest sense of the word. *Ellis* v. *United States,* 356 U.S. 674 (1958). Thacker's attorney told him to plead guilty, according to Thacker, because it would save the state the expense of a trial and because the convictions "wouldn't make much difference." Perhaps the attorney can defend the quality of his advocacy—or it may be that Thacker will be unable at a hearing to sustain his allegations—but it is hard to view such advice as the effective advocacy which due process demands. Only at a full hearing on the allegations in Thacker's petition can the facts be developed which will show whether the convictions may stand.

Once again this case demonstrates graphically the necessity that the factual hearing not be delayed any further. The evidence is already stale. Thacker was convicted almost fourteen years ago. He himself does not remember the name of his attorney, whom he saw only twice, on the day of the trial and later at the sentencing. In twenty-six years, when Thacker begins iron-bar service of these sentences, there is a substantial likelihood that it will be completely impossible for him to substantiate his allegations[2] or for the state to bear the burden of proof which Thacker's case, if proved, will place upon it. It would be pointless to require Clyde Thacker to wait in prison for twenty-six years while the very evidence which is crucial to the determination of his right to freedom disappears under the steady erosion of the passage of time. Even more obviously the Commonwealth can have no rational interest in watching the evidence necessary to rebut the pre-

[2] To support his allegation that counsel was appointed on the day of his trial, Thacker will, among other things, have to be able to produce evidence to resolve the potentially difficult question of the date of his trial. It is not clear whether he was tried and convicted on June 24, 1953 and sentenced on November 16, 1953 or both tried and sentenced on the later date. The court rolls seem to indicate that the trial date was November 16, 1953. (R. III, 22). However, Thacker has alleged that trial took place and he was found guilty on June 24. The presentence report also states that on June 24, "On his plea of guilty, subject was found guilty of housebreaking." (R. III, 7). Moreover, on motion of Thacker's counsel at this point, a presentence report was ordered prepared, a step which follows a finding of guilt under Virginia law. Va. Code Ann. § 53-278.1 (1967). The presentence report was filed on November 16, at which time the Circuit Court of Hanover County sentenced Thacker to three five-year prison terms, all of which were suspended for fifty years. The resolution of this factual issue of date of trial, which is crucial to at least one aspect of Thacker's constitutional claim, appears to rest on the memories of his counsel, the trial judge, various probation officers, and the court clerk. Whether even now he could prove his allegation is problematical. The passage of more years may render it impossible.

sumption of ineffective representation and, if Thacker prevails, to reconvict him of the offenses, vanish beyond recall.

Under the *McNally* rule, Rowe cannot petition for federal habeas corpus until 1993. Thacker is precluded by *McNally* from obtaining a federal hearing until 1994. Rowe and Thacker are faced with the inevitable prospect that they will have a much harder time a quarter of a century from now proving the factual claims upon which they base their assertions that they were unconstitutionally convicted.

This severe impairment of a prisoner's very ability to make out his case imposed by the needless delay in adjudication is a direct product of the *McNally* rule. A prisoner is rendered less able—perhaps totally unable—effectively to attack a conviction he alleges was imposed on him in violation of the Constitution because he must wait for years before he can bring a petition and secure a hearing. He must remain behind bars. He has no way of investigating his case. He has no means for conserving what evidence he does have. He cannot preserve the testimony, the memories, or even the lives of the witnesses upon whom he must depend for securing relief from an unconstitutional conviction.

As the Fourth Circuit pointed out in *Williams* v. *Peyton*, 372 F.2d 216, 220 (4th Cir. 1967), "delay may cause either the Commonwealth or the petitioner to forfeit the hearing (on habeas corpus) or retrial (of the substantive case) without regard to the merits of the case." Early litigation of constitutional claims in the post-conviction process "is to the benefit of all." *Ibid.* Perhaps the greatest beneficiary of early litigation is the state, for as the Supreme Court of Pennsylvania has put it:

> Eventually, . . . the heaviest detriment [flowing from the rule against attacking future sentences] comes to the Commonwealth. Upon a retrial, the Commonwealth has the traditional burden of proving the elements of its case beyond a reasonable doubt and meeting that burden obviously becomes more onerous ten or twenty years after the commission of the crime. To that extent time is not neutral but, rather, operates in such instances to the advantage of the accused.

Commonwealth ex rel. Stevens v. *Myers*, 419 Pa. 1, 15-16, 213 A.2d 613, 621-22 (1965).

The burden upon the federal judiciary of hearing post-conviction pleas from state prisoners is multiplied when stale cases must be litigated and constitutional claims decided on the basis of facts long buried by the passage of time. Nor can it be said that early litigation will increase the burden upon the federal courts by multiplying the number of times a given prisoner may petition for habeas corpus. The courts have always had discretion to refuse to entertain a second petition where justice would not be served. *Cf. Sanders* v. *United States*, 373 U.S. 1, 15 (1963). The Habeas Corpus Act of 1966, 28 U.S.C.A. § 2244 (Supp. 1967), makes it clear that only in very restricted circumstances need a second petition be entertained.

No one benefits and everyone loses by a construction of the custody requirement that prevents present attacks by prisoners in state custody upon present judgments which support future sentences. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, TASK

FORCE: THE COURTS 45 (1967). The prisoner who may never be able to vindicate his constitutional claim loses most of all.

The *McNally* determination that the asserted right to complete and immediate release from behind iron bars was a precondition for the Great Writ has been termed "one of the most frustrating elements of present post-conviction practice." AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO POST-CONVICTION REMEDIES 43 (Tent. draft 1967).

> Where consecutive sentences have been imposed, the immediate release condition can unreasonably postpone for years judicial consideration of the validity of a challenged conviction or sentence while the unchallenged sentences are being served. One of the most prevalent complaints about post-conviction review is the difficulty, once a conviction has been set aside of mounting a new prosecution many years after the crime. Should a retrial be necessary, it is to the great advantage of the prosecution and the defense to marshal their respective cases while the evidence is fresh and the witnesses are available.

Ibid. In the words of one commentator: "Its principal effect is to render the search for truth even more difficult because of lost evidence and faded memories." Note, *Habeas Corpus, Custody and Declaratory Judgment*, 53 Va. L. Rev. 673, 682 (1967).

The cases of Rowe and Thacker are typical of the case where "constitutional claims turn upon the resolution of contested factual issues." *Townsend* v. *Sain*, 372 U.S. 293, 312 (1963). The guarantee made clear there that a habeas

applicant will have at least one "full and fair fact hearing," *id.* at 313, is rendered illusory for them by the *McNally* rule.

B. Refusal to Hear a Claim That a Criminal Judgment Is Unconstitutional Until It Actively Prevents the Prisoner's Immediate Release Forces the Prisoner to Serve Time Under the Conviction Which He May Now Be Able to Show Was Imposed in Violation of His Constitutional Rights.

The inherent delays of the judicial process make it certain that even a successful collateral attack on a sentence of imprisonment will not come in time to save partial or even complete service of the sentence. See *Parker* v. *Ellis*, 362 U.S. 574, 577, 581-86 (1960) (dissenting opinion);[3] *Tucker* v. *Peyton*, 357 F.2d 115 (4th Cir. 1966). No one doubts that:

> Where an applicant with a meritorious claim is held in prison, the time that elapses during the post-conviction proceeding is a further serious deprivation of liberty, aggravating the hardship of imprisonment served prior to the application being filed.

American Bar Association Project on Minimum Standards for Criminal Justice, Standards Relating to Post-Conviction Remedies 64 (Tent. draft 1967). See also *Mathis* v. *United States*, 369 F.2d 43 (4th Cir. 1966). In ordinary circumstances these delays must simply be accepted as nec-

[3] Parker's petitions for habeas corpus were denied in the Texas courts on September 21, 1955; by the Supreme Court on certiorari on February 27, 1956; by the federal District Court on June 24, 1957; and by the Court of Appeals on August 29, 1958. Certiorari was granted on March 2, 1959, but Parker was released from prison on June 6, 1959, before this Court acted.

essary burdens in a system which, in seeking to assure that no man is unconstitutionally deprived of his freedom, provides for deference to state courts, 28 U.S.C.A. § 2254 (Supp. 1967), for independent federal fact finding in some circumstances, *Townsend* v. *Sain*, 372 U.S. 293 (1963), 28 U.S.C.A. § 2244 (Supp. 1967), and also for appellate review, 28 U.S.C. § 2253.

Rowe and Thacker, however, can be relieved of this burden. If their sentences scheduled for future service can be attacked now and are found invalid, they will have established their right to walk out of prison as free men when they have completed service of all sentences that serve as a constitutional basis for their incarceration by the state. The heaviest burden of the attacked sentence—time spent behind iron bars—can be lifted from them now. Otherwise even if they prevail in their attacks and establish the invalidity of the sentences, time will have been served under them.

It is difficult to explain why a rule of timing of collateral attack should be enforced in such a manner as to guarantee that an attack must be made when the prisoner should be free rather than during the twenty-six year period of continuous custody which will precede that time.

C. Outstanding Future Sentences Impose Restrictions Within the Prison System of the Sort for Which Habeas Corpus Has Been the Traditional Remedy. Length of Sentence and Number of Convictions Play a Significant Role in Determining the Amount of Freedom Any Individual Will Have in Prison and His Eligibility for the Various Rehabilitative Programs That Lie at the Heart of the Modern Penal System.

Well before sentences are scheduled for service, and even before they impinge upon a prisoner's eligibility or chances for parole, they have had a substantial effect upon the degree of custody to which a prisoner is subjected.

The very first decision made after an inmate is incarcerated to serve a sentence normally relates to the degree of custody which he will require within that institution.

> Institutions for adults ordinarily have three or four grades of custody: minimum, medium, maximum, with some using a close-custody category between medium and maximum. The custody classification ordinarily determines the type of supervision and the type of restrictions under which an inmate must live. For example, in an institution having cells and dormitories, inmates classified for minimum or medium custody may be permitted to live in dormitories, with more freedom of movement. Also the custody rating may determine whether the inmate may be used in certain types of employment.

Loveland, *Classification in the Prison System,* in The Sociology of Punishment and Correction 189, 191 (1962).

Within these complex gradations of custody and privilege and various programs of rehabilitation and education in

modern penal systems, a prisoner's status is inevitably determined in large part by his criminal record: the length and number of his sentences and the nature of the crimes of which he has been convicted. *Ibid.; cf.* Loving, Stockwell, and Dobbins, *Characteristics of Escapees, id.* 144, 145.[4] Typically, the new arrival at a prison is quarantined for a certain period, during which time his case is studied by a committee and he is "classified" for placement within the system's gradations of custody and training. This procedure is followed in Virginia. See DIVISION OF CORRECTIONS, VIRGINIA DEPARTMENT OF WELFARE AND INSTITUTIONS, CLASSIFICATION IN THE VIRGINIA PENAL SYSTEM 9-10 (1950) (hereinafter cited as CLASSIFICATION IN VIRGINIA). Virginia has a number of different penal institutions, see Va. Code Ann. §§ 53-20 to 53-128 (1967), which are apparently designed, as in the typical penal system, to provide differing degrees of custody and different vocational and educational programs, see CLASSIFICATION IN VIRGINIA 3, 7-8. Moreover, within the system as a whole there are the typical gradations of custody, ranging from "meditation" and "segregation" within the notorious maximum security unit of the Virginia penitentiary, "C" building, see *Landman* v. *Peyton,* 370 F.2d 135 (4th Cir. 1966), *cert. denied,* 388 U.S. 920 (1967); *Howard* v. *Smyth,* 365 F.2d 428 (4th Cir.) *cert. denied,* 385 U.S. 988 (1966), through inclusion in the normal prison population, to "minimum custody," where the "inmate is sufficiently trustworthy to be allowed to live in honor camps or their equivalent and to hold trusty jobs outside the limits of the main institution." CLASSIFICATION

[4] The individual may not only be transferred within the institution to different grades of custody; he may also be moved to an entirely different institution of greater or lesser custody. Loveland, *supra* at 192.

IN VIRGINIA 7. The inmate's initial assignment to institution, type of custody and vocational program is made by the classification committee. *Id.* at 6-8. Typically such "preselection" is made "on the basis of geography, age, *length of sentence,* nature of offense, *prior criminal record* and other factors." RICHMOND, PRISON PROFILES 14 (1965) (emphasis added). Thus unconstitutional convictions to be served in the future clearly impinge upon a prisoner from the moment he enters a penal institution; such sentences play the same role as a valid sentence in determining how a prisoner will be treated within the system, the amount of freedom he will have, and his very placement within the prison's rehabilitative vocational program, which exerts a potent influence on his entire future.

The effect of multiple sentences upon treatment of a prisoner is magnified in most penal institutions by the variation between theory and practice. The objective of true individualized treatment is impaired both by the inevitable administrative difficulties created by the prison context, and the lack of articulated criteria for the classification and treatment of individuals. Virginia agrees with most other jurisdictions that "classification is a method of individualized study of prisoners which utilizes information secured, as a basis for recommending a treatment program for the prisoner aimed at his retraining and re-education while in prison." CLASSIFICATION IN VIRGINIA 1. Compare AMERICAN CORRECTIONAL ASSOCIATION, MANUAL OF CORRECTIONAL STANDARDS 262 (1954). The state's manual on classification procedures does not contain any guidance on the factors to be taken into account in formulating a treatment program or how the committee is to go about evaluating the individual prisoner. It has been pointed out that "be-

cause operational guides are lacking, these objectives [of the classification program] are easier to realize in manuals than in reality." KORN & MCCORKLE, CRIMINOLOGY AND PENOLOGY 479 (1959). As administrative procedures rigidify, the role which such factors as length of sentence and number of convictions play in the treatment of a prisoner is inevitably magnified.

Virginia seeks to avoid this administrative rigidity through a system of periodic "reclassification." CLASSIFICATION IN VIRGINIA 4-5. The efficacy of this system of review is impaired, however, by the fact that reclassification does not take place at regular intervals, is discretionary with the classification committee, and apparently takes place only when some member of the committee feels that "a major change in the prisoner's recommended program is indicated." *Id.* at 5. Indeed, studies have indicated that where, as in Virginia, treatment and classification are separate functions performed by separate groups of officials, and classification is carried on by a group of disparate specialists who have little contact with the prisoner during his stay outside of an initial personal interview and occasional later contact, there is an inherent risk that communications will "snarl" and procedures will become inflexible. JOHNSON, CRIME, CORRECTION, AND SOCIETY 606-07 (1964). Where this happens it is inevitable that the sheer statistics in a prisoner's record, principally his total term, will weigh heavily in the determination of the nature of his continued custody and treatment within the prison. When some of the convictions which represent the ciphers in this custody-treatment equation have been imposed in violation of the federal constitution, they are real and severe and immediate restraints upon the prisoner's liberty

far worse than those which the Great Writ has already been used to attack. See *Jones* v. *Cunningham,* 371 U.S. 236 (1963). The fact that they are to be served in the future in no way lessens the impact of such convictions on the relative freedom which a prisoner has within the penal system, nor ameliorates the manner in which they influence the choice of his work program and thus the way in which the individual prisoner is to be related to the grand rehabilitative ideal. They are not considered present sentences or future sentences. They are just plain sentences which have an impact on the prisoner.

Rehabilitation is the great ideal of modern penology. Success or failure of a penal program is judged in terms of the percentage of recidivism. See *e.g.,* GLASSER, THE EFFECTIVENESS OF A PRISON AND PAROLE SYSTEM ch. 4 (1964). The Virginia Department of Corrections, in the introduction to CLASSIFICATION IN VIRGINIA, states that the objective of the prison system is "to provide for the protection of society which involves efforts to correct and restore prisoners to society better able to live self-sustaining and useful lives upon their release."

To this end a variety of vocational and educational programs are universally provided in American prisons today. Our common sense tells us that, just as the number of convictions a man has will inevitably exert an influence upon the parole board considering his case for release, prison officials are going to expend more time and effort in the rehabilitation of men with prospects for imminent return to society than with long-termers, both because the latter will probably not be released for many years and because the very length of their records will be taken as evidence that they are beyond rehabilitation.

Rehabilitative potential tends to vary inversely with length of total sentence. See Farber, *Suffering and Time Perspective of the Prisoner,* 20 University of Iowa Studies in Child Welfare 155 (1944). Long consecutive sentences produce desperation in prisoners. TAPPAN, CRIME, JUSTICE AND CORRECTION 470 (1960); JOHNSON, CRIME, CORRECTION, AND SOCIETY 523-24 (1964).[5] Prison administrators are aware of this. To the extent convictions imposed in violation of the Constitution play a part in such considerations, they presently affect the prisoner in the context of our modern penal system.

II.

A State Prisoner Committed Under Consecutive Sentences Is Entitled to a Federal Habeas Corpus Hearing if Any of His Sentences Is Based Upon a Prima Facie Unconstitutional Conviction.

McNally, a federal prisoner, alleged that an unconstitutional sentence was being taken into account in computing his eligibility for consideration by the parole board for

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[5] Aside from these tangible effects, can it not be said that the senseless imposition of procedures which subject a prisoner to continuous uncertainty with respect to his rightful release date, and continuous frustration at his inability to secure relief from convictions unjustly imposed, constitutes cruel and unusual punishment? The relationship of the eighth amendment to the rehabilitative ideal is unclear. See Note, *Revival of the Eighth Amendment: Development of Cruel-Punishment Doctrine by the Supreme Court,* 16 Stan. L. Rev. 996, 1012-13 (1964); *cf. Robinson* v. *California,* 370 U.S. 660 (1962). However, there is a very real sense in which the erection of procedural barriers which serve no valid purpose and which impose such frustrations upon the prisoner that his rehabilitative progress is as a practical matter severely impeded is senselessly cruel. And why is not the needless fostering of anguish, frustration, uncertainty and bitterness, when the remedy involves nothing more difficult than early adjudication of claims, cruel in and of itself?

conditional release from the penitentiary. He further alleged that if only his constitutional sentences were considered he would be eligible to apply for parole. *McNally* v. *Hill*, 293 U.S. 131 (1934). This Court held that the writ would only issue under the statute "for the purpose of inquiring into the cause of restraint of liberty," *id.* at 135, and that the "sentence which the prisoner has not yet begun to serve cannot be the cause of restraint which the statute makes the subject of inquiry." *Id.* at 138.

Almost thirty years later this Court again considered what those restraints on liberty were which would cause the writ to issue and unanimously held it to be the function of federal courts to give meaningful content to the statutory phrase "in custody" in 28 U.S.C. § 2241:

> The habeas corpus jurisdictional statute implements the constitutional command that the writ of habeas corpus be made available. While limiting its availability to those "in custody," the statute does not attempt to mark the boundaries of "custody" . . . .

Jones v. *Cunningham*, 371 U.S. 236, 238 (1963) (footnote omitted). Whether a particular restraint constitutes "custody" is, this Court said, to be determined by looking to "common-law usages and the history of habeas corpus both in England and in this country." *Ibid.* The Fourth Circuit has done just this.

Confronting the precise *McNally* situation on an application from a prisoner of the Commonwealth of Virginia, the Fourth Circuit reasoned that after *Jones* v. *Cunningham* and *Fay* v. *Noia*, 372 U.S. 391 (1963), this Court, "faced with the issue today . . . might well reconsider *McNally* and hold that a denial of eligibility for parole is a 'restraint

of liberty' no less substantial than the technical restraint of parole." *Martin* v. *Virginia*, 349 F.2d 781, 784 (4th Cir. 1965). The court then held that a bar to eligibility for consideration for parole and conditional release was a restraint of liberty within the reach of habeas corpus.

Two years later, upon the petition of a prisoner whose eligibility for parole was no longer barred by his allegedly illegal sentence since in the process of exhausting his state remedies he had become eligible, the Fourth Circuit held that the very existence of the allegedly illegal sentences was so likely to prejudice his chances for conditional release on parole that habeas corpus must be made available. *Williams* v. *Peyton*, 372 F.2d 216 (4th Cir. 1967).

These holdings—deliberate and reasoned departures from *McNally*—advance the inevitable day on which the Commonwealth will have to account for the alleged deprivations of constitutional rights in Rowe's and Thacker's convictions. In early 1971, when the allegedly invalid sentence for abduction begins to affect Rowe's parole eligibility, he will be able to attack the conviction under *Martin* v. *Virginia*, 349 F.2d 781 (4th Cir. 1965). Thacker is seeking to attack sentences which can never affect his statutory eligibility for parole, since the total period of his incarceration is to be so lengthy. He will, however, become automatically eligible for parole in 1976 at the expiration of 12 years from the date of his present confinement. VA. CODE ANN. § 53-251 (1967). When he becomes eligible for parole, he will be in a position to test the legality of his housebreaking sentences under the Fourth Circuit departure from *McNally*. *Williams* v. *Peyton*, 372 F.2d 216 (4th Cir. 1967).

Williams and *Martin* read strictly would still result in the wasteful postponement of factual hearings upon peti-

tions which should be heard as soon as possible, and would take no account either of real detriments imposed by presently outstanding sentences to be served in the future, or of the power of the court to make the Great Writ presently available. The Fourth Circuit recognized this and concluded that taking the further step in the present case was "both logical and necessary" (A. 18), *Rowe* v. *Peyton*, 383 F.2d 709, 715 (4th Cir. 1967).

The "grand purpose" of the Great Writ of habeas corpus is "the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty." *Jones* v. *Cunningham*, 371 U.S. 236, 243 (1963). That purpose cannot be achieved where the availability of the writ is hedged about with restrictions which are both technical and unnecessary and which may ultimately destroy the one chance an unconstitutionally convicted prisoner has to demonstrate that the state denied him due process of law. Habeas corpus "is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose." *Jones* v. *Cunningham*, 371 U.S. 236, 243 (1963). The writ lies to lift restraints upon an individual's liberty "to do those things which in this country free men are entitled to do." *Ibid.*

Jones represented no abrupt break with the past. While in a comparatively recent attempt to limit the functional content of the "custody" language in the federal habeas corpus statutes, this Court had refused to issue the writ unless it could result in the prisoner's immediate and total release from iron-bar confinement, *Holiday* v. *Johnston*, 313 U.S. 342 (1941); *McNally* v. *Hill*, 293 U.S. 131 (1934),*

* In each case where this Court held premature the application for a writ of habeas corpus to attack a sentence scheduled for future service it carefully pointed out the existence of another

Jones recognized the subtle gradations of "custody" and "restraints upon liberty" which have come into being since the dark days of the Star Chamber. Jones, a convict out on parole, was permitted to attack the constitutionality of the conviction which empowered the parole board to control his right to travel, to drive a car and to do numerous other things "which in this country free men are entitled to do." *Jones* v. *Cunningham, supra,* 243. In making the writ available to Jones, this Court aligned itself with the liberal historical tradition of the writ, which has been invoked in a variety of situations far removed from the context of release from prison confinement.

Pointing to this historical virtuosity, this Court declared that "the Great Writ . . . always could and still can reach behind prison walls and iron bars. But it can do more." *Ibid.* Mr. Justice Black catalogued some of the legal impairments which the writ has been invoked to remove. Habeas corpus has been available to husbands seeking to free their wives from constraint of guardians, *Rex* v. *Clarkson,* 1 Str. 444, 93 Eng. Rep. 625 (K.B. 1722), and to require a master to surrender an indentured 18-year-old girl, *Rex* v. *Delaval,* 3 Burr. 1434, 97 Eng. Rep. 913 (K.B. 1763). And despite the statutory "custody" language, "in the United States the use of habeas corpus has not been restricted to situations in which the applicant is in actual, physical custody." 371 U.S. at 239. Thus this Court has

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method of securing relief in the federal courts. *McNally* v. *Hill,* 293 U.S. 131 (1934) (mandamus of the parole board); *Holiday* v. *Johnston,* 313 U.S. 342 (1941) (application for vacation of sentence and resentence in conformity); *Heflin* v. *United States,* 358 U.S. 415 (1959) (Federal Rule of Criminal Procedure 35). In *Darr* v. *Burford,* 339 U.S. 200, 203 (1950) the question of a remedy was not urged and alternative grounds for denial of the writ were present.

repeatedly granted habeas corpus to determine the validity of an alien's exclusion from the United States, even though the petitioner was free to travel anywhere else in the world. *E.g., Brownell* v. *Tom We Shung,* 352 U.S. 180 (1956); *Shaughnessy* v. *United States ex rel. Mezei,* 345 U.S. 206 (1953). Habeas has also been long considered the appropriate vehicle for challenging induction into the armed forces, *e.g., United States ex rel. Steinberg* v. *Graham,* 57 F. Supp. 938 (E.D. Ark. 1944), and for settling disputes between parents over the custody of children, *e.g., Boardman* v. *Boardman,* 135 Conn. 124, 62 A.2d 521 (1948). The history of this humane and flexible judicial tool demonstrates that it is available to test a wide variety of legal impairments, "restraints upon a man's liberty, restraints not shared by the public generally," 371 U.S. at 240, for which no other remedy lies.

Even in the narrow context of post-conviction relief, where the writ has blossomed into a great vehicle for safeguarding federal rights by securing federal judicial review, *e.g., Fay* v. *Noia,* 372 U.S. 391 (1963); *Brown* v. *Allen,* 344 U.S. 443 (1953), this Court never rigidly and mechanically insisted that a prisoner assert a right to immediate release from all custody in order to invoke the writ. As early as 1894, this Court permitted a federal prisoner incorrectly sentenced to a prison term and confined in a state penitentiary (no federal prison was available) to seek transfer to a federal jail, even though the writ could not effect his release from custody. *In re Bonner,* 151 U.S. 242 (1894). And in *Ex parte Hull,* 312 U.S. 546 (1941), decided just before *Holiday* v. *Johnston,* 313 U.S. 342 (1941), the Court seriously undermined the release-from-custody rule by allowing a prisoner whose parole under a prior sentence was

revoked when he received a second conviction to attack the second conviction while still serving the admittedly valid first sentence.

Some lower courts have read *Jones*, in the context of this Court's repeatedly demonstrated concern with the availability of some federal post-conviction remedy to test the constitutionality of state criminal convictions, as signalling a recognition that the rigidities of the old "custody" jurisprudence will not serve the "grand purpose" of the writ in a time characterized by a proliferation of increasingly subtle correctional processes and developing standards of due process of law. The Ninth Circuit, for example, held in reliance on *Jones* that probation constitutes sufficient "custody" for issuance of the writ. *Benson* v. *California*, 328 F.2d 159 (9th Cir. 1964).

Nor have the courts been insensitive to the anomaly inherent in expanding the availability of the writ to test restraints imposed outside the prison context while continuing to hold those actually incarcerated to the rigors of a strict and formalistic approach. Thus it has been held since *Jones* that a prisoner may attack a sentence he is presently serving, even though invalidation of the sentence will not result in his immediate release because he still must serve other consecutive future sentences. *United States ex rel. Watson* v. *Myers*, 250 F. Supp. 292 (E.D. Pa. 1966). The Fourth Circuit has permitted a state prisoner to attack a sentence he has already served, on the theory that it would advance the time at which he began serving his current valid sentence, even though he had not served enough total time to satisfy the valid sentence. *Tucker* v. *Peyton*, 357 F.2d 115 (4th Cir. 1966). The Ninth Circuit has held the writ available to attack past sentences that rendered a prisoner

ineligible for probation at his sentencing for his current, admittedly valid conviction. *Arketa* v. *Wilson*, 373 F.2d 582 (9th Cir. 1967). The Second Circuit has consistently held that if an allegedly invalid prior conviction has caused the petitioner to be sentenced under a different schedule of penalties as a second offender he can seek habeas corpus even though he has not yet served the sentence he might have received as a first offender. *United States ex rel. LaNear* v. *LaVallee*, 306 F.2d 417 (2d Cir. 1962). And in *Martin* v. *Virginia*, 349 F.2d 781 (4th Cir. 1965), reading *Jones* in light of the Court's strong emphasis in *Fay* v. *Noia*, 372 U.S. 391, 424 (1963), upon

> the manifest federal policy that federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for plenary federal judicial review,

the Fourth Circuit concluded on the basis of *Jones* and *Noia* that this Court would decide *McNally* differently today, and permitted an incarcerated petitioner to seek habeas corpus where the only effect was to render him eligible for parole. The court stated that in practical terms the convictions under attack were "the real, effective basis of Martin's continuing detention in a penal institution," 349 F.2d at 784, since they deprived the parole board of any discretion to release him from custody.

The conclusion of these lower courts is thoroughly consistent with the history of the Great Writ as articulated in *Jones* v. *Cunningham*. *McNally*, insofar as it is premised on a holding that only simple iron-bar confinement which is alleged to be invalid may be reached by habeas corpus, is an aberration in the history of the Writ. The Writ

neither historically nor statutorily is limited to such situations: all intolerable restraints on liberty can be attacked by the writ—at least when no other remedy is available.

What remains then is a rule of timing which receives no sanction from the statute. Granting relief to Rowe and Thacker now rather than in 1993, 1976, or 1971 will mean that the Superintendent would be forbidden now and henceforth to attach any significance to the attacked sentences. He must adjust his records by deleting from the totality of their custodial tenure the sentences invalid under the Constitution and laws of the United States.

A. The Great Writ Is Not Limited by Statute to Those Prisoners Who Assert an Immediate Right to Complete Release From All Forms of Custody Whatsoever.

The *McNally* decision is understandable only in light of the inarticulate premise—since expressly rejected by this Court in *Jones* v. *Cunningham,* 371 U.S. 236 (1963)—that the only restraint upon liberty federal habeas corpus may relieve in post-conviction cases is physical imprisonment behind iron bars. Any restraint short of this, such as present ineligibility to be considered for parole, was held not to qualify as a "restraint which the statute makes the subject of inquiry." 293 U.S. at 138. Given this premise, there was only one form of restraint, iron-bar custody, cognizable in a habeas proceeding, and a petition which failed to allege facts showing unlawful iron-bar custody was without merit. No hearing was required because on the facts alleged the habeas corpus remedy was unavailable.

After the *Jones* decision, it was once again clear that restraints upon personal liberty not amounting to iron-bar

custody may nonetheless constitute the custody that "is a prerequisite to habeas." *Fay* v. *Noia*, 372 U.S. 391, 427 n. 38 (1963). While it remained true that "the only remedy that can be granted on habeas is some form of discharge from custody," *ibid.*, a new question arose when the subtler forms of custody—custody without iron bars—were recognized in *Jones* as within the scope of the Great Writ. For the first time since *McNally*, there existed the possibility of two simultaneous "custodies," one within the other, one unlawful and the other lawful. Thus a prisoner lawfully held in the "custody" of iron bars might nonetheless allege his personal liberty constituting an unlawful "custody" significant, intolerable, unconstitutional restraints upon from which habeas corpus is available to discharge him. This possibility had been present before *McNally* introduced the aberrational limitation of habeas to cases of unlawful physical confinement, and it arose with greatly expanded significance almost thirty years later, when the erroneous premise of *McNally* was expressly considered and rejected by this Court in *Jones*.

Thus the Fourth Circuit in *Martin* v. *Virginia*, 349 F.2d 781 (4th Cir. 1965), though faced with the precise facts of *McNally*, was confronted with a significantly different legal problem because of the renewed recognition in *Jones* that the Great Writ lies to remedy unlawful restraints of liberty less complete than the totality of custody behind iron bars. The Fourth Circuit properly held, on the basis of *Jones*, that the obvious, clear-cut restraint of personal liberty inhering in ineligibility to be considered for parole was a custody from which discharge could be afforded by the federal writ of habeas corpus even though Martin might remain in iron-bar custody. If Martin's future sentence was imposed without due process, he could be totally and

immediately released from the intolerable restraint of parole ineligibility—the certain custody of iron bars—and remanded to the less onerous custody of imprisonment with eligibility for parole, and possibly the even less severe custody of parole itself, outside the walls of the Virginia State Penitentiary.

The Great Writ "reaches behind prison walls and iron bars. But it can do more." *Jones* v. *Cunningham,* 371 U.S. 236, 243 (1963). In *Jones* the writ did more in that it operated outside iron bars. It can also "do more," can discharge prisoners from intolerable, unconstitutional restraints of personal liberty, within prison. Habeas corpus is a prisoner's writ. It is his access to court, and his remedy for release from unlawful restraints within prison as well as from unlawful imprisonment itself.

The *McNally* premise limiting habeas relief to those cases where complete immediate discharge from iron-bar custody could be granted was an aberration in the history of habeas corpus. There is certainly nothing in the language of federal habeas corpus legislation, nor has there ever been, that compels the *McNally* premise.[7] As this Court observed in *Jones,* the statute does not purport to tell us what "custody" means. 371 U.S. at 238. Further the historical development of the federal legislation suggests that the word "custody," as well as the similar expressions "detention" and "restraint of liberty," have been used at different times with such variant purposes that to attach a restrictive technical meaning to the word "custody," as was done in *McNally,* is a hazardous business, and especially

[7] The relevant statutory provisions, from the Judiciary Act of 1789 to date, are included in an Appendix to this brief.

so in light of the fundamental and libertarian "grand purpose" of the Great Writ.

In section 14 of the Judiciary Act of September 24, 1789, c. 20, 1 Stat. 81, 82, the first federal habeas corpus statute, the "cause of commitment" was made the subject of inquiry on habeas corpus. The word "custody" was used only to limit jurisdiction in cases involving "prisoners in gaol" to prisoners in federal, as distinguished from state, custody. Federal habeas corpus was not generally extended to state prisoners until the Act of February 5, 1867, c. 28, 14 Stat. 385, 386, which gave federal courts "power to grant writs of habeas corpus in all cases where any person may be restrained of his liberty in violation of the constitution, or of any treaty or law of the United States." The only reference to "custody" is a provision that the person applying for the writ should set forth "in whose custody he or she is detained."

The 1867 act was intended to extend federal habeas corpus jurisdiction to prisoners in state custody who claimed a federal right to be free from a restraint upon personal liberty. Its intended scope was recognized by this Court in *Fay* v. *Noia*, 372 U.S. 391, 417 (1963): it was " 'to enlarge the privilege of the writ . . . and make the jurisdiction of the courts and judges of the United States coextensive with all the powers that can be conferred upon them. It is a bill of the largest liberty.' " (Quoting remarks of Representative Lawrence of Ohio, who sponsored the bill, Cong. Globe, 39th Cong., 1st Sess. 4151.) The act " 'brings within the habeas corpus jurisdiction of every court and of every judge every possible case of privation of liberty contrary to the National Constitution, treaties or laws. It is impossible to widen this jurisdiction.' " (Quoting *Ex Parte McCardle*, 6 Wall. 318, 325-326 (1868).)

Had the issue decided in *McNally* in 1934 arisen earlier under the language of the Judiciary Act of 1789, it would appropriately have turned upon construction of the phrase "cause of commitment" rather than the word "custody." If the same issue had arisen originally in a state prisoner's case under the 1867 Act, it would have turned upon construction of the phrase "restrained of his liberty." In the codification of federal habeas corpus legislation in Title 13 of the Revised Statutes of 1874, §§ 751-766, the jurisdictional grants of earlier legislation were collected in one provision, section 753. Here, in the clause governing habeas corpus to state prisoners, the word "custody" was substituted for the phrase "restrained of his liberty," and the identity of the two concepts arose. "Custody in the sense of restraint of liberty is a prerequisite to habeas," as this Court observed in *Fay* v. *Noia*, 372 U.S. 391, 427 n. 38 (1963).

In the form they acquired in 1874 and still retain, the federal habeas corpus provisions suggest affirmatively that relief need not be limited to the discharge from all custody or to cases in which imprisonment itself is totally unlawful, as *McNally* held. Today, the relief authorized is disposition "of the matter as law and justice require." 28 U.S.C. § 2243 (1964). At the time of *McNally*, the provision called for disposition "of the party as law and justice require." 28 U.S.C. §761 (1925). The 1867 act extending habeas corpus to state prisoners provided that "if it shall appear that the petitioner is deprived of his or her liberty, in contravention of the constitution or laws of the United States, he or she shall forthwith be set at liberty." Act of Feb. 5, 1867, c. 28, 14 Stat. 384-85. Section 14 of the Judiciary Act of Sept. 24, 1789, c. 20, 1 Stat. 81, 82, conferred authority to issue the writ "agreeable to the principles of

law," and "for the purpose of an inquiry into the cause of commitment."

If the statutes had meant to limit habeas corpus relief to complete discharge from all custody, language unequivocally to this effect might have been chosen. But it never was. The varying uses of the word custody, and the increasingly flexible statutory provisions describing the relief available upon the writ, suggest that Congress never considered the *McNally* problem.

In *McNally* this Court found in the statute governing federal prisoners a requirement limiting habeas corpus to those asserting a right to release from all custody. In quoting the statutory custody requirement for federal prisoners, the Court's opinion quoted with it the deceptively symmetrical language referring to custody of state prisoners "in violation of the Constitution or of a law or treaty of the United States" that had been introduced in the Revised Statutes of 1874. 293 U.S. at 135-36. This may well have contributed to the conclusion the Court reached; the custody language in the two clauses has two very different histories. In addition to the statutory language, the Court relied upon the English common law, the Habeas Corpus Act of 1679, 31 Car. 2, c. 2, English decisions interpreting that Act, and prior decisions of this Court, as giving meaning to the statutory language. 293 U.S. at 136-39.

It is true, of course, that in the great majority of English as well as American cases the unlawful restraint from which relief was sought did amount to the total custody of physical imprisonment. Beyond this, however, the English precedents relied upon in *McNally* contain no affirmative support for the *McNally* result, and do not speak to the

McNally problem one way or the other. This is largely because the writ's use under the Act of 1679 was directed primarily to the validity of pretrial commitment and the prisoner's entitlement to bail, 293 U.S. at 137, n. 1, rather than to post-conviction relief. In such cases, the criminal trial court either has jurisdiction to try the offense or it does not, and the offense is either subject or not subject to bail; if there is any wrongful restraint upon liberty, it is imprisonment itself. Early English common law's failure to speak to the *McNally* problem is also due in part to a pre-Revolutionary social framework in which today's subtle forms of restraint upon liberty were unfamiliar. The web of restrictions imposed upon Jones' liberty by his parole order, in *Jones* v. *Cunningham,* 371 U.S. 236 (1963), and the far-reaching impact of his unreversed Texas conviction upon Parker's rights and future as a free man in *Parker* v. *Ellis,* 362 U.S. 574 (1960), are relatively recent social phenomena, and it should not be surprising that an eighteenth-century Englishman would be unlikely to anticipate them, and more concerned with the simpler problem of challenging the jailer's right to hold him behind iron bars.

In any event, the Great Writ was not restricted to applicants demanding total release from physical confinement even in eighteenth-century England, as this Court observed in *Jones* v. *Cunningham, supra* at 238-39 (1963). In *Rex* v. *Delaval,* 3 Burr. 1434, 97 Eng. Rep. 913 (K.B. 1763), for example, the writ was used to require production in court of Anne Catley, a minor apprenticed by her father to William Bates, because Bates had assigned her indenture to Delaval for immoral purposes. Apparently suspecting that Blake and the girl's parents were parties to the conspiracy against her, the court observed that its duty was "'to judge upon the circumstances of the particular case;

and to give their directions accordingly'," and ordered that Anne Catley "be discharged from all restraint, and be at liberty to go where she will." *Id.* at 1437, 97 Eng. Rep. at 914. Lord Mansfield indicated that under other circumstances the girl might have been returned to her father's custody. If Blake had not participated in the conspiracy, she might properly have been restored to lawful custody under the original apprenticeship indenture. Thus when faced with a complicated web of custodial claims, the King's Bench was not incapable of distinguishing between legal detention in custody and unlawfully imposed restraints of different scope.

The value of pre-Constitutional English precedents in determining the availability of the federal writ of habeas corpus in a twentieth-century context depends largely upon the mode in which the English precedents are used by this Court. In *McNally,* they were read for the least that they might mean rather than with an eye to the central function that it has been the writ's historic mission to fulfill. Significant unlawful restraint of personal liberty is certainly the historic evil that the Great Writ has been destined to eliminate, see *Jones* v. *Cunningham,* 371 U.S. 236, 238-40 (1963); *Fay* v. *Noia,* 372 U.S. 391, 401-02 (1963). This central truth is amply supported by the English precedents. But to predicate a technical restriction of the writ upon the absence of English precedent affirmatively establishing an identical use of the writ in a time when there would have been no occasion for it is to misuse history. Habeas corpus

> is not now and never has been a static, narrow formalistic remedy; its scope has grown to achieve its grand purpose—the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty.

Jones v. *Cunningham, supra* at 243. If the writ cannot now reach Rowe and Thacker it is because *McNally* read a static, narrow, formalistic conception of the Great Writ into the English precedents.

Nor was *McNally* supported by prior decisions of this Court. One line of cases upon which the Court relied in *McNally* included those holding "that *habeas corpus* may not be used as a writ of error to correct an erroneous judgment of conviction of crime, but may be resorted to only where the judgment is void because the court was without jurisdiction to render it." 293 U.S. at 138. Whatever collateral support such cases may have afforded *McNally* in 1934 is no longer available in light of subsequent decisions of this Court. *E.g., Fay* v. *Noia,* 372 U.S. 391 (1963).

The *McNally* opinion did not claim direct affirmative support in prior decisions of this Court, but did cite eight cases (while distinguishing two) in support of the statement that "wherever the issue has been presented, this Court has consistently refused to review, upon *habeas corpus,* questions which do not concern the lawfulness of the detention." 293 U.S. at 139. None of these eight cases may fairly be regarded as supporting the *McNally* doctrine. One of them, *United States* v. *Pridgeon,* 153 U.S. 48 (1894), provides a good example.

Pridgeon had been sentenced by a territorial court to five years' imprisonment at hard labor. Upon hearing Pridgeon's application for habeas corpus, a federal circuit court held he was entitled to release because the imposition of hard labor was beyond the power of the sentencing court and rendered the entire sentence void. The correctness of this holding came before this Court upon a certified question from the Sixth Circuit. The Court concluded:

(1) even if the imposition of hard labor were void rather than merely error, the sentence to five years' imprisonment was valid and Pridgeon should not be released from all custody on habeas corpus; and

(2) it was not necessary now to determine whether the imposition of hard labor was void or merely error, or "what would have been the proper action of the Circuit Court in dealing with the petitioner's application." 153 U.S. at 64.

The question thus left open in *Pridgeon* was, of course, the crucial one. And in dicta the Court suggested an answer squarely in conflict with *McNally*. Observing that release from custody would be more relief than "law and justice require" under section 761 of the Revised Statutes of 1874, since the most *Pridgeon* could have secured upon a writ of error would have been relief from the imposition of hard labor, 153 U.S. at 63, the Court's opinion suggested that proper disposition of the case would depend upon categorization of the defect in the sentence as voidness or error. If it were the latter, the Circuit Court should have denied the writ; if, on the other hand, the imposition of hard labor were void, a proper disposition would have been to recommit *Pridgeon* to the warden

> with directions to carry out and enforce only that portion of the sentence imposing imprisonment for five years, according to the rules, regulations, and discipline of the institution.

153 U.S. at 64.[8]

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[8] The suggested disposition in *Pridgeon* is strikingly similar to that suggested by the Fourth Circuit in the instant case: "[T]he court may order the Warden to strike it from the administrative records and, henceforth, to hold the prisoners for service of the valid convictions only." (A. 26-27), 383 F.2d 709, 719 (4th Cir. 1967).

Relief of the kind suggested in *United States* v. *Pridgeon* is, of course, precisely what the Court in *McNally* said was beyond the scope of habeas corpus. Yet *McNally* purported to rely upon *Pridgeon*. Thus the *McNally* thesis that a claim to immediate release from all custody must be asserted in order for federal habeas corpus to be available was not supported by pre-Constitutional English precedent nor the jurisprudence of this Court, and was not compelled by the language or history of federal habeas corpus legislation. In fact, the central purpose of the Great Writ, and its historic function as a remedy always available to challenge intolerable restraints of liberty, required and now require the opposite result.

Indeed, the arbitrary nature of a refusal to permit a man in jail to attack any part of his sentence at any time is pointed up by the variant ways in which the chronology of multiple sentences is computed. In some jurisdictions, sentences are considered to be served in the order in which they were imposed. See, *e.g.*, *Ex parte Hull*, 312 U.S. 546 (1941). In Virginia, on the other hand, sentences are served in reverse order, where a parole or suspension on an earlier sentence is revoked and a new sentence imposed at approximately the same time. *Peyton* v. *Williams*, 206 Va. 595, 145 S.E.2d 147 (1965).[9] The order in which a state chooses to list the sentences which a prisoner has to serve is not the sort of substantial consideration which should be allowed to affect the quality of adjudication available in a federal court upon a claim of deprivation of constitutional right. Whether a state chooses to list a man's sentence chronologically or in reverse chronological order, a prisoner with a

[9] Even within the prescribed framework, clerical or judicial errors in scheduling and computation can produce weird results. See *Perkins* v. *Peyton*, 369 F.2d 590 (4th Cir. 1966).

number of sentences to serve has precisely the same interest in being allowed to attack his sentence at the earliest possible moment. For a certain number of convictions, the prisoner is required to serve a certain number of years in the penitentiary. The time at which, in abstract administrative theory, he begins to serve the sentences which he wishes to attack does not change in any way either the posture of the litigation, or the interest of the parties in early and final adjudication of the constitutional issues.

In this very case it is impossible to ascertain any rational reason why Rowe should be allowed in 1983[10] to attack a 30-yeaf sentence imposed in June, 1963, and yet be prevented from attacking a sentence imposed six days later until ten more years pass—or for that matter why Thacker, now said to be serving a sentence imposed in 1964, must wait until 1994 to attack three sentences imposed in 1953.

And so the Fourth Circuit concluded:

> In a technical sense, each of the prisoners here is presently serving only one of the sentences imposed to run consecutively, but in a substantive and practical sense Rowe is serving a total commitment of 50 years and Thacker one of more than 64. For purposes of determining parole eligibility, Virginia treats the aggregate time imposed by consecutive sentences as "the term of imprisonment."[11] To the prisoner, members of his family, and fellow prisoners it matters little how the order of sentence service is listed by the clerk in the superintendent's office. The one significant, sub-

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[10] If Rowe alleged his first sentence (30 years) was invalid rather than his second (20 years), he could attack the first sentence when he served all of the time for which the state was entitled to hold him.

[11] VA. CODE ANN. § 53-251 (1967).

stantive thing is the aggregate length of his successive sentences to be served, for they govern entirely his hope for ultimate release whether by parole or by complete sentence service.

The administrative computation of the sequence of sentence service is a flimsy basis to determine the right of access to the courts for a determination of substantial constitutional claims. . . . When the one important, substantive fact is the aggregate of all of the successive sentences a prisoner is required to serve, his right of access to the courts should not be conditioned upon the sequence in which the state chooses to list consecutive or successive sentences for service.

It is only in a highly technical sense, therefore, that each of these prisoners may be said not to be serving the sentence he seeks to attack. In a substantive sense, each is serving each of the sentences for the service of which he was committed, regardless of the sequence in which Virginia has listed them for service.

Rowe v. *Peyton*, (A. 23-24), 383 F.2d 709, 717-18 (4th Cir. 1967).

B. A Federal Court Has Judicial Power to Award Present Relief in a Habeas Corpus Proceeding From Future Unconstitutional Imprisonment Under an Existing Sentence.

From the moment it is imposed, an invalid sentence clearly restrains a prisoner's liberty in significant and intolerable ways, even though it is administratively scheduled for future rather than present service. Classification and treatment within prison, and eligibility and chances for parole, are factors to which no court should close its eyes.

McNally was aberrational in holding that only the totality of physical imprisonment might be challenged in a federal habeas proceeding.

But another proposition, nowhere articulated in the *McNally* opinion, is essential to support the denial of all relief in *McNally*'s case. *McNally* was not only rendered presently ineligible for parole by the sentence he sought to attack; he would ultimately have to serve it. Even disregarding present restraints, and restraints that will definitely impinge upon a prisoner's liberty before technical iron-bar service of an invalid sentence commences and assuming the writ can only reach iron-bar confinement this Court in *McNally* was surely aware that the attacked sentence would ultimately result in custody even under the narrow, technical definition of that term adopted in the *McNally* case. McNally faced the certain prospect of physical imprisonment under it unless he should die, or be pardoned or paroled, before finishing service of his other sentences. Inherent in *McNally*'s holding that "a sentence which the prisoner has not begun to serve cannot be the cause of restraint which the statute makes the subject of inquiry," 293 U.S. 131, 138 (1934), is the thesis that either the statute or the Constitution incapacitates a federal court from giving present judicial relief against future unconstitutional imprisonment.

The *McNally* opinion does not explain why this should be so. The federal judicial power created by Article III of the Constitution has proved flexible enough to permit the fashioning of appropriate remedies in other contexts involving threatened future violation of constitutional rights. The statutory history of federal habeas corpus does

not reveal that any legislative attention was ever specially directed to the problem of timing in the granting of habeas relief. This Court has in a consistent line of decisions approved use of the Great Writ to grant postponed, conditional release in cases where reprosecution was deemed permissible. Other federal legislation directed specifically to the problem of timing in the granting of federal judicial relief, the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02, authorizes present judicial determination in cases of actual controversy even where no form of coercive relief is yet available. One of the historic functions of the Great Writ is to make full and fair fact hearings available upon claims of intolerable restraint of personal liberty, whatever the obstacles. In cases where evidence to prove a claim to release from imprisonment will in all likelihood have disappeared by the time the right to immediate release has matured, all of these considerations demand departure from the *McNally* premise that habeas corpus must await maturing of the right to immediate release.

By far the severest restraints upon the liberty of Rowe and Thacker that will ever flow from their allegedly unconstitutional convictions is their future incarceration under sentences already imposed upon them by the Virginia courts. The Superintendent of the Virginia State Penitentiary has, under *Peyton* v. *Williams,* 206 Va. 595, 145 S.E. 2d 147 (1965), postponed execution of these invalid sentences until service of other sentences has been completed, some twenty-five years hence. At that time, the Superintendent asserts the right, and is required by Virginia law, VA. CODE ANN. § 53-207 (1967), to take Rowe's liberty away completely for twenty additional years, and Thacker's for an additional fifteen years, less time off for good behavior.

These future restraints of personal liberty are of the severest kind. They are far more onerous than those from which this Court held habeas relief available in *Jones* v. *Cunningham,* 371 U.S. 236 (1963). Here total liberty is menaced. Under his parole order Jones was not permitted to drive a car, and required to live in a particular community and house, and work at a particular job. Rowe's and Thacker's movements, living quarters and work will be far more seriously circumscribed. Jones was required to submit to inspection visits at home and at work by parole officers; Rowe and Thacker will enjoy no privacy at all. Incarceration is the ultimate restraint upon personal liberty.

Only in one respect might Jones' restraints be regarded as more serious than the future prison terms Rowe and Thacker seek to challenge: Jones was already suffering the restrictions of which he complained, while the incarceration Rowe and Thacker seek to attack is a future unconstitutional prolongation of present imprisonment. But even though remote in time, imprisonment under these sentences is not remote in probability. They will be served unless death, parole or pardon intervenes.

If sentences have been unconstitutionally imposed and administratively scheduled for future service, it is not beyond the power of a federal court to afford present relief from them. There is no functional reason why a court cannot effectively grant present judicial release from a future unconstitutional restraint of liberty. Judicial relief from future imprisonment under postponed unconstitutional sentences would be coercive relief, requiring the Superintendent not to execute the sentences. The full operative impact of such relief would occur conditionally, and

at a future time, if and when valid sentences had been served, and only if Virginia had not by then obtained valid convictions by reprosecuting Rowe and Thacker in proceedings affording them due process of law.

These three qualities—coerciveness, futurity, and conditionality—are not extraordinary aspects of traditional judicial relief, nor of habeas corpus relief. All judicial relief in habeas cases is essentially coercive. Even if phrased in apparently self-executing language of discharge from custody, the court's order in effect enjoins the custodian from ever again restraining the released prisoner under the invalidated conviction. If an appropriate situation should arise, there appears to be no reason why a court might not properly award purely declaratory relief as well. See *Parker* v. *Ellis*, 362 U.S. 574, 577, 583 (1960) (dissenting opinion); 28 U.S.C. §§ 2201, 2202. But the relative rarity of such situations points up the essentially coercive nature of the Great Writ.

Coercive relief generally, and in habeas corpus cases as well, is characterized by futurity of operation. Thus in *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925), this Court approved the granting of an injunction against enforcement of an unconstitutional Oregon statute "more than 2 years and 5 months" prior to the effective date of the statute. See *Society of Sisters* v. *Pierce*, 296 Fed. 928, 933 (D. Oregon 1924). In the most realistic sense, any judicial release from custody can at best only approach the ideal of immediate effect. Further, when release is ordered, it is often made conditional, and postponed until specified future events. In *Rogers* v. *Richmond*, 365 U.S. 534, 549 (1960), for example, this Court ordered release on habeas in a coerced

confession case, to be postponed "in order to give the State opportunity to retry petitioner, in light of this opinion, within a reasonable time." *Accord, Davis* v. *North Carolina,* 384 U.S. 737, 753 (1966); *Cf. Sheppard* v. *Maxwell,* 384 U.S. 333, 363 (1966). In *Jackson* v. *Denno,* 378 U.S. 368 (1964), this Court went one step further in postponing and conditioning relief upon habeas. There, a judgment denying release on habeas was reversed and the case was remanded to the district court, but release was ordered postponed for a reasonable time to enable the state either to afford an adequate hearing on the petitioner's coerced confession claim, and retry him if his claim was sustained, or to retry him without attempting to validate the conviction by such a hearing. Only if the state should fail to take either of these courses was the prisoner to be, after a reasonable time, released. 378 U.S. at 395-96. *Accord, Boles* v. *Stevenson,* 379 U.S. 43 (1964). For an early precursor of the practice, see *In re Medley,* 134 U.S. 160, 175 (1890) (requiring that state attorney general be given "at least 10 days notice before the release of the prisoner").[12]

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[12] An extreme instance of futurity and conditionality in judicial relief upon habeas corpus may be found in *United States* v. *Mason,* 344 F.2d 673 (2d Cir. 1965). There, the Second Circuit entertained a habeas petition by a Spanish seaman imprisoned by the United States Navy on behalf of the Immigration and Naturalization Service (INS) as a deserter from the Spanish Navy subject to extradition under a 1903 treaty between Spain and the United States. That court concluded that neither INS nor the Navy had lawful authority to execute this provision of the treaty, but observed "that Congress and perhaps the President could easily establish a domestic enforcement machinery" for executing the provision, under which a custodian could be validly authorized to detain the complaining seaman. 344 F.2d at 688 (opinion by Marshall, J.). Thereupon the court ordered that "the petition for the writ of habeas corpus be granted and relator set at liberty, unless within a reasonable time the INS institutes appropriate deportation proceedings under

In both *Rogers* and *Jackson*, the dispositions of this Court indicated that the court below was to hold the habeas case upon its docket for the purpose of determining when a reasonable time had passed and then implementing release if the constitutionally necessary steps to justify imprisonment had not been taken by the state. Nonetheless, these decisions contemplate and in fact require the court below to issue a conditional judgment, ordering release upon habeas corpus at a future time specified only as "reasonable," and then only if certain events have not occurred. In *Sheppard* v. *Maxwell, supra,* the Court explicitly directed that the writ ordering conditional release be issued. Such conditional, prospective coercive orders are frequent in habeas cases.

> Courts finding in favor of applicants are frequently reluctant to order them immediately discharged from custody, where there is no bar to the reprosecution of the charges against them. A device sometimes used is the conditional order, providing for release at the end of six months (or some similar and extensive period) unless a new conviction is obtained within that time.

AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO POST-CONVICTION REMEDIES 80 (Tent. draft 1967).

Conditional future release in the *Rogers-Jackson-Sheppard* line of decisions may, of course, be distinguished from the conditional future release sought by Rowe and Thacker.

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the Immigration and Nationality Act of 1952, or some agency demonstrating to the District Court that it has competence to execute Article XXIV of the 1903 Treaty with Spain takes over the conduct of relator's case." *Ibid.*

In those cases, the petitioners were able to assert that the warden had no present lawful authority to hold them in custody of any kind. Postponement of release is justified by the practical consideration that in many cases a petitioner unconstitutionally convicted can be properly retried.

But the distinction does not withstand close scrutiny. A state prisoner convicted upon a coerced confession is not in actuality asserting a right to immediate release from all custody. He is asserting a right to be released from all custody at a future time if the state has at that time either decided administratively not to reprosecute, or reprosecuted without success. If that is the maximum relief this Court authorizes in such cases, it surely does not matter that the petitioner in such a case may assert fictitiously that he is entitled to immediate release from all custody. His actual right to release is qualified by futurity and conditionality, and is not different in kind from the rights asserted here.[12]

No one seriously could question, and in fact the Commonwealth concedes, that Rowe and Thacker cannot possibly be given adequate hearings in 1993 or 1994 on their factual

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[12] A habeas petitioner who is subject to reprosecution may also assert a present right to be discharged from the unlawful restraints of custody as a convicted felon into the less onerous custody of one accused of crime and committed for trial. Between the judgment ordering conditional future discharge from all custody and its effective date, it may be proper to alleviate penitentiary imprisonment by ordering that the petitioner's right to prepare his defense be effectuated by affording a right "to bail or detention in the county of trial." AMERICAN BAR ASSOCIATION PROJECT, *supra* at 80. In appropriate cases, such relief should be afforded upon habeas corpus, just as Rowe and Thacker are presently entitled not only to a judicial determination of their rights to future release from all custody, but also to immediate release from all present restraints of liberty flowing from their sentences scheduled for future service.

assertions concerning events that took place in 1953 and 1963. Nor is it suggested that the Superintendent of the Virginia State Penitentiary would or legally could release them at that time unless a court has ordered him to do so or judicially declared that the sentences scheduled for service then may not lawfully be carried into execution. Virginia will not provide an adequate factual hearing and determination of this question because it follows the *McNally* doctrine, as construed by its Supreme Court of Appeals, and holds that no habeas corpus hearing may be held to determine the validity of a sentence administratively scheduled by the Superintendent for future service until that service commences. *Peyton* v. *Williams,* 206 Va. 595, 145 S.E.2d 147 (1965). If this Court adheres to *McNally,* no federal hearing will be available until that time, either.

The reasoning of this Court in supporting grant of an injunction against enforcement of a statute well in advance of its effective date in *Pierce* v. *Society of Sisters,* 268 U.S. 510, 536 (1925), was that "injury to appellees was present and very real," and "if no relief had been possible prior to the effective date of the act, the injury would have become irreparable." The same reasoning supports present judicial relief from sentences already imposed but administratively scheduled for future service. If no relief is presently given, irreparable injury will have occurred by the time relief can be given. Not only will the prisoners be compelled to serve time under the sentences in question while pressing their claims to relief through the courts; as a practical matter, their claims will have been destroyed by the passage of time. In both respects, their injury will have become irreparable.

Habeas corpus is uniquely and historically suited to afford a constitutionally reliable fact hearing on a prisoner's claim for judicial relief from unconstitutional restraint of liberty. Whatever obstacles to such a hearing custodians may have thrown up at different times, habeas corpus has overcome. When no fact hearing is required, the writ may properly be limited to its ultimate purpose of discharging a prisoner from custody. *Walker* v. *Johnston*, 312 U.S. 275, 283-86 (1941); 28 U.S.C. § 2243. But when facts material to lawfulness of detention are controverted, habeas corpus opens the way to a hearing on those facts. Obstacles to fact hearings have ranged from the primitive fact that the prime and complaining witness is in the custodial control of the defending respondent to the more sophisticated doctrinal obstacle of *res judicata*. But neither the resistance of a contumacious warden nor "conventional notions of finality in criminal litigation" have been permitted "to defeat the manifest federal policy that federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for plenary federal judicial review." *Fay* v. *Noia*, 372 U.S. 391, 424 (1963). "Plenary federal judicial review" includes full and fair hearing and determination upon controverted fact issues. The Great Writ has historically been the remedy that affords it.

> Even if the state court adjudication turns wholly on primary, historical facts, the Federal District Court has a broad *power* on habeas to hold an evidentiary hearing and determine the facts.

Id. at 422.

The obstacle to a full and fair fact hearing in this case is not the Superintendent's power to prevent the major

witnesses from testifying. Nor is it the conclusive effect normally accorded to final state court adjudications. Rather it is the obstacle of staleness, of the disappearance of evidence and the disappearance or death of witnesses to prove the prisoners' claims, combining with the patent inability of a prisoner to take any steps to protect himself by gathering and preserving evidence. If habeas corpus assures plenary fact hearings on claims of unconstitutional restraint of liberty, habeas corpus is and must be available now, while there are witnesses and evidence available to be heard and examined. It is not beyond the capacity of the Great Writ to overcome this obstacle.

If respondents are denied any effective opportunity to prove their claims by the conjunction of the *McNally* doctrine and Virginia's concurrent denial of any post-conviction remedy, serious constitutional questions are presented. This Court granted certiorari in *Case* v. *Nebraska*, 380 U.S. 924 (1965), to determine whether a state was required to make available an adequate post-conviction corrective process for litigating federal claims. Intervening action by the Nebraska legislature rendered decision unnecessary, and the case was remanded. 381 U.S. 336 (1965). This Court thus did not have to answer either the limited question of the Fourteenth Amendment due process compulsion to make such a remedy available or the supplementary question what constitutes an adequate corrective process.

In a concurring opinion, 381 U.S. at 340-47, Mr. Justice Brennan suggested that necessary attributes of an adequate corrective process include swiftness and full fact-finding. The *McNally* interpretation of section 2241 as a limitation on the time when violations of the federal Constitution in obtaining a conviction may be raised presents under the

Fifth Amendment the question whether Congress has denied due process by so limiting the federal corrective process for claims of federal unconstitutionality.

When federal prisoners seek relief, the analogy between federal and state due process is complete. When state prisoners seek federal relief and the state corrective process is inadequate because the state follows the *McNally* rule, as in this case, the constitutional question that caused certiorari to issue in *Case* v. *Nebraska* is present. Constitutional inadequacy of the state corrective process would itself make the prisoner's confinement a federally unlawful custody, and without more entitle him to discharge. Even as to states that do not apply the *McNally* limitation, such as California, the *McNally* interpretation of section 2241 would render it constitutionally infirm as depriving federal courts of the only effective means—a swift and, if necessary, evidentiary habeas hearing—to determine whether the state's corrective process was in fact constitutionally adequate, under the principles this Court announced in *Townsend* v. *Sain,* 372 U.S. 293 (1963).

These serious constitutional questions are obviated by the interpretation of section 2241 urged here, which would not prohibit federal courts from hearing and determining claims that convictions and sentences have been unconstitutionally imposed prior to their actual iron-bar service in the *McNally* sense.

III.

Prisoners With Presently Outstanding Sentences Which Must Be Served in the Future Have a Justiciable Controversy With the State Which Allegedly Violated Their Constitutional Rights in Obtaining the Convictions. If the Sentences Are Invalid They Are Entitled to Declaratory Relief Whether Habeas Corpus Is Available or Not.

If this Court should conclude that habeas corpus is unavailable to Rowe and Thacker, the case is not ended. The habeas petitions should be treated as motions for declaratory judgment, and the courts below should be directed to entertain these motions, hold factual hearings and rule now upon the constitutional allegations.

The Federal Declaratory Judgment Act, 28 U.S.C. § 2201 (1964), provides:

> In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

The beneficent remedial purpose of this act is to provide a "speedy and inexpensive method of adjudicating legal disputes before damage has actually been suffered." *Lehigh Coal & Nav. Co.* v. *Central R.R.*, 33 F. Supp. 362, 365 (E.D. Pa. 1940). Only by adjudicating the questions pre-

sented by Thacker and Rowe now can this court assure that potentially unconstitutional sentences may be invalidated "before damage has actually been suffered." Nothing in the language of the statute or in the jurisprudence of declaratory judgments impedes the grant of present relief to Rowe and Thacker. See *Ragan* v. *Commandant*, 290 F.2d 132 (10th Cir. 1961). There is federal jurisdiction of their claims, the cases present justiciable controversies ripe for decision at this time, and there is no occasion for discretionary abstention from the exercise of the court's power to declare the rights of these two state prisoners. See Note, *Habeas Corpus, Custody and Declaratory Judgment*, 53 Va. L. Rev. 673, 687-701 (1967). Indeed, the very policies the act was designed to serve compel the conclusion that declaratory relief should be available here. As the Fourth Circuit recognized early in the judicial career of the Declaratory Judgment Act in a leading interpretation:

> We think this discretion [to grant declaratory relief] should be liberally exercised to effectuate the purposes of the statute and thereby afford relief from uncertainty and insecurity with respect to rights, status and other legal relations.

Aetna Cas. & Sur. Co. v. *Quarles*, 92 F.2d 321, 324 (4th Cir. 1937).

Nor is the Declaratory Judgment Act any stranger to criminal-related proceedings or to tests of the legality of confinement. "The declaratory judgment is a general remedy not confined to any particular type of controversy." *Hurley* v. *Reed*, 288 F.2d 844, 846 n. 5 (D.C. Cir. 1961). It has been invoked to permit a prisoner to raise the issue of his right to counsel at a hearing to revoke his parole.

Hurley v. *Reed, supra; Washington* v. *Hagan,* 287 F.2d 332 (3d Cir. 1960). And in *Miley* v. *Lovett,* 193 F.2d 712 (4th Cir. 1952), the Fourth Circuit, facing a problem analogous to that in these cases, held that where the right of an army officer to test his involuntary continuation in the service on habeas corpus was challenged, the court could grant a declaratory judgment.

Yet no case has been found which actually grants declaratory post-conviction relief in the absence of habeas corpus. A number of courts have considered the question and summarily denied declaratory judgment. See, *e.g., Forsythe* v. *Ohio,* 333 F.2d 678 (6th Cir. 1964); *Waldon* v. *Iowa,* 323 F.2d 852 (8th Cir. 1963).

Typically, the courts have given no more than cursory attention to the question. See generally, Note, *Habeas Corpus, Custody and Declaratory Judgment,* 53 Va. L. Rev. 673, 687-701 (1967). When a reason is given it invariably is just a restatement of the already-reached conclusion that declaratory judgment simply is not appropriate since the purpose of the remedy was said to be "to have a declaration of rights not theretofore determined, and not to determine whether rights theretofore adjudicated have been properly adjudicated." *Hurley* v. *Lindsay,* 207 F.2d 410, 411 (4th Cir. 1953); see *Clark* v. *Memolo,* 174 F.2d 978 (D.C. Cir. 1949). In recognition of the compelling considerations militating in favor of immediate attack on allegedly invalid criminal convictions the Fourth Circuit has been careful to keep the question of the availability of declaratory relief open:

> The present availability of some remedy is certainly highly desirable. While the challenged conviction imposes no present detriment upon Foraker, it is almost

> certain that he will suffer detriment from it in the future unless death in the interim period relieves him of all his burdens. If he lives so long, he certainly would be allowed to attack the judgment in a collateral proceeding once he begins to serve it or even as soon as it has an effect upon his eligibility for parole. By that time, however, his court-assigned lawyer, the Judge before whom he was tried, the Commonwealth's attorney and the court reporter may all have died, or the case become so dim in their memories that they could contribute nothing as witnesses. . . .
>
> Instead of leaving the matter in limbo over so long a period of time, the desirability of some present inquiry when potential witnesses are available and recollections relatively fresh has an urgent obviousness.

Foraker v. *Virginia*, No. 9950 (4th Cir., Dec. 9, 1966), at 2-3.

What the court said of John Foraker applies with equal force to the cases of Robert Rowe and Clyde Thacker. Their very right to release from confinement once their allegedly unconstitutional sentences begin to affect their parole eligibility, may depend on whether they are allowed to litigate the legality of their convictions now, while evidence remains available and memories remain relatively sharp.

A. An Independent Basis for Jurisdiction Exists in the Civil Rights Act, 28 U.S.C. § 1343, Which Confers Power on the Federal Courts to Protect the Full Range of Fourteenth Amendment Rights.

The Declaratory Judgment Act is not a source of jurisdiction; an independent basis of federal subject matter

jurisdiction must exist. *Schilling* v. *Rogers*, 363 U.S. 666, 677 (1960). 28 U.S.C. § 1343 (1964), provides:

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> . . .
>
> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States . . . .

A civil action for damages or injunctive relief "or other proper proceeding for redress" for the deprivation of such rights is authorized by 42 U.S.C. § 1983 (1964). Together these two statutes are designed to protect the full range of Fourteenth Amendment rights. See *Monroe* v. *Pape*, 365 U.S. 167 (1961); *Hague* v. *CIO*, 307 U.S. 496, 526 (1939) (opinion of Stone, J.). Rowe and Thacker have made substantial allegations to the effect that they have been convicted of crimes by a procedure violative of due process. If there is no other way to protect their Fourteenth Amendment rights, declaratory relief must be afforded them. The federal courts have jurisdiction to hear their petitions for declaratory relief.

B. Rowe and Thacker Have a Clearly Justiciable Controversy With Virginia Over the Constitutional Validity of Judgments Imposed Upon Them by That State. Their Controversy Becomes Less Ripe With the Passage of Time, Which May Ultimately Moot the Dispute.

The Declaratory Judgment Act cannot, of course, be used to circumvent the constitutional requirement of a "case or controversy." *Aetna Life Ins. Co.* v. *Haworth,* 300 U.S. 227 (1937). The cases at bar present archetypal examples of fully justiciable controversies where the grant of declaratory relief can forestall inevitable prejudice to one party or the other.

The essence of a "case or controversy" within the meaning of Article III is a proceeding (1) involving an actual dispute over legal relations, (2) between parties of clear adverse interest, which (3) is presented in sufficiently concrete form that courts may appropriately determine the relief to which the parties are entitled. See *Aetna Life Ins. Co.* v. *Haworth,* 300 U.S. 227, 240-41 (1937); Pugh, *The Federal Declaratory Remedy: Justiciability, Jurisdiction and Related Problems,* 6 Vand. L. Rev. 79, 84-96 (1952). The rule seeks

> to insure that the judiciary will have the benefit of deciding legal questions in a truly adversary proceeding in which there is the "impact of actuality," and in which the contentiousness of the parties may be relied upon to bring to light all relevant considerations.

Parker v. *Ellis,* 362 U.S. 574, 592 (1960) (Warren, C.J., dissenting) (footnotes omitted).

These requirements are clearly fulfilled here. See Note, 53 Va. L. Rev. 673, 688-92 (1967). The questions which Rowe and Thacker seek to have adjudicated are "appropriate for judicial determination." *Aetna Life Ins. Co.* v. *Haworth,* 300 U.S. 227, 240 (1937). They are "legal" questions, of the type which courts decide all the time, and which normally would be justiciable on habeas corpus. The adversity of the parties and their interest in the outcome of the litigation is clear.

Rowe and Thacker are prisoners in state custody. They *seek to attack allegedly* unconstitutional judgments already entered against them which presently affect the nature of their custody and will some day be the only basis for their custody. The state has an interest in upholding its criminal judgments and in retaining custody over convicted felons. The parties are clearly adverse.

Just as clearly the controversy is "ripe" for adjudication at this point. The ripeness requirement is desiged to insure that courts do not decide hypothetical controversies, and that the clash of interests is presented in sufficiently concrete form that the rights asserted by the parties and the relief to which they may be entitled can clearly be discerned by the court. See *United Public Workers* v. *Mitchell,* 330 U.S. 75, 89 (1947); *Muskrat* v. *United States,* 219 U.S. 346, 357 (1911). Here the clash of interests is clear, and Rowe and Thacker claim the right to specific and definite relief—invalidation of their convictions, so that the state will be prevented from depriving them of liberty under the judgments without due process of law. There is nothing hypothetical about these cases; they are no less ripe for adjudication in a constitutional sense than were *Martin* v. *Virginia,* 349 F.2d 781 (4th Cir. 1965), and *Williams* v.

Peyton, 372 F.2d 216 (4th Cir. 1967). Indeed, a refusal to adjudicate the claims at the present time could effectively, if not legally, moot them. The passage of time will render the necessary fact-finding inevitably more difficult and perhaps impossible. Precisely this consideration moved this Court to grant declaratory relief in the first case upholding the constitutionality of the Federal Declaratory Judgment Act:

> [P]laintiff points to the danger that it may lose the benefit of evidence through disappearance, illness or death of witnesses; and meanwhile, in the absence of a judicial decision with respect to the alleged disability, the plaintiff in relation to these policies will be compelled to maintain reserves in excess of $20,000.

Aetna Life Ins. Co. v. *Haworth*, 300 U.S. 227, 239 (1937).

The case for declaratory relief is even stronger here than it was in *Haworth*, for the loss of evidence in the event the litigation is delayed will affect not merely 20,000 dollars worth of insurance benefits, but the liberty of two men and the power of society to impose restraints for its own protection. And if Rowe and Thacker were to be ultimately successful in their attacks after being required to wait until habeas corpus became available, they would not merely be required to keep a certain amount of money unnecessarily in reserve, but to serve time in prison on unconstitutional convictions. This court can prevent the full materialization of these presently and potentially unfortunate and unconstitutional effects by ordering the courts below to hear and decide these cases for declaratory relief.

C. The Federal Courts Have the Power to Declare the Rights of Rowe, Thacker and the Commonwealth of Virginia. That Power Should Be Exercised When the Interests of Rowe, Thacker, the Commonwealth of Virginia and the United States Are Best Served by an Immediate Determination of the Controversy.

The Declaratory Judgment Act is not mandatory. The courts have discretion to refuse to entertain petitions for declaratory relief in appropriate cases *Public Affairs Associates, Inc.* v. *Rickover,* 369 U.S. 111, 112 (1962); *Brillhart* v. *Excess Ins. Co.,* 316 U.S. 491, 494 (1942). Where, however, the purposes of the act will be served by granting declaratory relief, the courts should exercise their discretion to hear such cases liberally. *Aetna Cas. & Sur. Co.* v. *Quarles,* 92 F.2d 321, 324 (4th Cir. 1937). Abstention from decision is clearly not appropriate. Typically courts will exercise their discretion not to hear justiciable cases for declaratory judgment when the decree would not finally settle the controversy between the parties, *e.g., Williams* v. *Ball,* 294 F.2d 94 (2d Cir. 1961), *cert. denied,* 368 U.S. 990 (1962), where the adjudication would cause inconvenience to some parties, *e.g., Kozol* v. *Lumbermens Mut. Cas. Co.,* 201 F. Supp. 718 (D. Mass. 1962), or where the parties may be said to be engaging in "procedural fencing," *e.g., Shell Oil Co.* v. *Frusetta,* 290 F.2d 689, 692 (9th Cir. 1961). None of these inhibiting circumstances is present here. On the contrary, the Court is presented with a case where the essential policies of the Declaratory Judgment Act will be served by granting declaratory relief to the parties. Professor Borchard, one of the drafters of the federal act, has articulated the criteria for the exercise of the courts' discretion in these cases. He has said that declaratory judgment should be granted

(1) when the judgment will serve a useful purpose in clarifying and settling the legal relations in issue, and (2) when it will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding.

BORCHARD, DECLARATORY JUDGMENTS 299 (2d ed. 1941). Both these criteria are satisfied here. The court has an opportunity to settle now, when the factual issues may be presented in far sharper fashion than ever again, the right of the state of Virginia to incarcerate or otherwise restrain Robert Rowe and Clyde Thacker on the basis of the attacked convictions.

Concern for federal-state relations has been one factor which has apparently stayed the hand of some federal courts faced with the question whether declaratory judgment may be employed by prisoners seeking post-conviction relief. This concern has been expressed in part as a fear that declaratory judgment might be used to circumvent the federal habeas requirement, see 28 U.S.C.A. § 2254 (Supp. 1967), that state prisoners exhaust their state remedies before applying for federal relief. See *Waldon* v. *Iowa*, 323 F.2d 852 (8th Cir. 1963). Clearly, however, early federal adjudication is likely to produce far less interference with state criminal procedures than late adjudication, when the state may be hard-pressed to uphold its judgment or to retry the prisoner. Indeed, since habeas corpus itself is in the nature of an equitable proceeding, *Fay* v. *Noia*, 372 U.S. 391, 438 (1963), it is possible that the state might be able to invoke the doctrine of laches to protect its judgment in a case where a prisoner deliberately delayed seeking the writ until the evidence had so

faded that the state was unable effectively to defend its criminal process or to retry him. Compare *United States* v. *Rockower*, 171 F.2d 423 (2d Cir. 1948), *cert. denied*, 337 U.S. 931 (1949) (laches applied in coram nobis proceeding); *United States* v. *Moore*, 166 F.2d 102 (7th Cir.), *cert. denied*, 334 U.S. 849 (1948) (same). Recognition of the state's interest in not being forced to defend its criminal judgments when the defendant has deliberately rendered it more difficult to do so by delaying his application for relief is inconsistent with the notion that early federal adjudication of federal rights will exacerbate federal-state relations.

Moreover, while the Civil Rights Acts do not require the exhaustion of state remedies, see *Monroe* v. *Pape*, 365 U.S. 167, 183 (1961), such a condition would seem to be an appropriate exercise of the federal courts' discretion in declaratory post-conviction relief cases. The Supreme Court has expressed a strong policy in favor of affording the states "the opportunity to pass upon and correct errors of federal law in the state prisoner's conviction." *Fay* v. *Noia*, 372 U.S. 391, 438 (1963). The courts can give effect to this policy by requiring prisoners who seek declaratory relief to have exhausted their state remedies first.

Of course, the notion of exhaustion of state remedies presupposes the existence of an *adequate* remedy in the state courts, *Young* v. *Ragen*, 337 U.S. 235, 239 (1949), and habeas corpus petitioners are only required to exhaust those remedies which are presently available to them, *Fay* v. *Noia*, 372 U.S. 391, 435 (1963); *Williams* v. *Peyton*, 372 F.2d 216 (4th Cir. 1967). Thus if the state provided no form of post-conviction relief until the prisoner could satisfy the traditional custody requirement, there would be

no state remedies to exhaust. To the extent, however, that the availability of a federal declaratory remedy would provide an impetus to the states to reexamine the timing of their collateral attack procedures and to permit attack at the earliest possible time, it would have the salutary effect of opening all courts to prisoners at the time when their claims may be most effectively litigated. Indeed, a number of state legislatures and courts, recognizing the overwhelming considerations in favor of early factual hearings on claims of denials of constitutional rights in the criminal process, have abandoned technical time limitations on the availability of post-conviction relief. See Or. Rev. Stat. § 138.510 (1967); Md. Ann. Code art. 27, § 645A (1967); *Simon* v. *Director*, 235 Md. 626, 201 A.2d 371 (1964); *State* v. *Losieau*, 180 Neb. 696, 144 N.W.2d 435 (1966); *State ex rel. Goodchild* v. *Burke*, 27 Wis. 2d 244, 133 N.W.2d 753 (1965); *Commonwealth ex rel. Stevens* v. *Myers*, 419 Pa. 1, 213 A.2d 613 (1965); *State ex rel. Holm* v. *Tahash*, 272 Minn. 466, 139 N.W.2d 161 (1965); *In Re Chapman*, 43 Cal. 2d 385, 273 P.2d 817 (1954).

The invocation of declaratory judgment for state prisoners whose claims are considered premature under the habeas corpus custody requirement would also promote greater stability of criminal judgments. Where the federal hearing, if one is necessary, is held while the facts are still readily discoverable and the evidence is relatively fresh, the states will be in a better position to defend their judgments against the claims of prisoners who can make out a prima facie case of denial of constitutional rights. In many situations—for example, where long-continued exclusion of Negroes from juries is demonstrated, see *Norris* v. *Alabama*, 294 U.S. 587 (1935), or where counsel is appointed

for an indigent so late that only scant trial preparation is possible, see *Twiford* v. *Peyton*, 372 F.2d 670, 673 (4th Cir. 1967)—the prisoner can shift the burden of proof to the state by making out a prima facie case. The passage of time may obscure the actual facts sufficiently that the state is helpless to demonstrate compliance with the requirements of due process of law or lack of prejudice to the prisoner.

Furthermore, a degree of conclusive effect could be given to the federal declaratory judgment, so that state criminal judgments could rest secure following one full, fair federal review. The doctrine of res judicata poses a number of intricate problems in the context of the declaratory remedy for state prisoners, which deserve exploration here. Underlying criminal judgments which have been obtained in violation of constitutional rights are, of course, entitled to no res judicata effect in a collateral proceeding. Nor do federal courts in such proceedings accord res judicata effect to state post-conviction remedies. *Fay* v. *Noia*, 372 U.S. 391, 424 (1963). Of course, deference is paid to state post-conviction remedies and to the state criminal process in general by the rule applied in federal habeas corpus that where the factual claim has been litigated fully and fairly in the state courts no new hearing should be held by the federal habeas court. *Townsend* v. *Sain*, 372 U.S. 293 (1963).

The same reasoning would apply to the declaratory post-conviction remedy, even though the courts would not be acting under their habeas jurisdiction. The exhaustion requirement would be imposed in the discretion of the federal courts as a matter of comity, and it would not deprive them of the power of review. The strong federal policy favoring full federal judicial review of claimed denials

of federal rights would justify a refusal by the court in a declaratory proceeding to give res judicata effect to state post-conviction remedies. *Cf. United States* v. *United States Fid. & Guar. Co.*, 309 U.S. 506 (1940) (public policy exception to res judicata). However, considerations of proper deference to state determinations would support a discretionary refusal to entertain declaratory judgment actions where the *Townsend* criteria for a federal habeas hearing are not met.

A federal declaratory judgment upholding a conviction would be entitled to the same degree of conclusiveness in a later habeas corpus proceeding as would an earlier denial of habeas relief. Such a rule could mesh with 28 U.S.C.A. § 2244 (Supp. 1967) to reduce friction between federal and state courts, and to mitigate the burden placed upon federal courts by habeas petitions, by imparting greater stability to state criminal judgments, while at the same time permitting the federal claims of state prisoners to be heard as early as possible, in order to safeguard the fairness of the proceedings.

IV.

The Constitutionality of Sentences Imposed by a State Is Never a Merely Academic Question Since the State Now and Forever Asserts the Right to Treat the Sentence as a Valid Basis for State Action.

The Commonwealth of Virginia concedes that a present remedy for Rowe and Thacker is desirable from the point of view of the prisoners and the Commonwealth. Brief for Petitioner, 9. Virginia's only contention is that provision of a remedy requires legislative revision. *Id.* at 9-11. Cali-

fornia in an *amicus* brief, pp. 16-20, contends that a present federal remedy is undesirable. Interestingly enough California courts do not now follow the *McNally* rule. *In re Chapman,* 43 Cal. 2d 385, 273 P.2d 817 (1954). The California contention thus is that those California prisoners who are not yet serving their attacked sentences and who have failed to secure a favorable adjudication of their post-conviction claims in the state courts should not be afforded the normal opportunity to seek a federal hearing at the conclusion of the state proceedings but should wait until they enter upon technical sentence service.

If the prisoner's guilt presented a sufficiently justiciable, non-academic question for the state to prosecute him and for a court to sentence him, it is difficult to appreciate an argument that claimed unconstitutionality in the process by which guilt was determined and sentence imposed presents merely an academic question. But California contends that the question is too academic for federal consideration now since intervening events may relieve the prisoner from ever entering upon actual iron-bar service.

> The claims of Rowe and Thacker may never need to be heard. Before they commence their consecutive sentences they may die, be pardoned, or abandon their claim because they receive parole.

Brief for Amicus Curiae, 18. To assert that death renders a question academic is only to assert a truism. All cases that are personal to litigants are rendered moot by death. Moreover, only 676 of 136,864 discharges from prison in 1965 (0.5%) resulted from death. UNITED STATES DEPT. OF JUSTICE, NATIONAL PRISONER STATISTICS 12. Only 13 (0.009%) resulted from full pardons. *Ibid.* Moreover, it is

not clear that even a pardon for innocence frees the inmate from the possibility of being treated as a multiple offender on the basis of the offense from which he has been pardoned. AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, SENTENCING ALTERNATIVES AND PROCEDURES 170 (Tent. draft 1967).

In fact, each sentence attacked here will either result in continued iron-bar custody being imposed or in qualifying eligibility for or the possibility of parole (unless of course death or full pardon intervenes). Even if parole is granted as a matter of the parole board's discretion the validity of the sentences has not become an academic question. To the extent that the questioned sentences affect either the restrictions of the parole or its length, this Court has already held that habeas corpus is available to the parolee. *Jones* v. *Cunningham*, 371 U.S. 236 (1963). Moreover, parole itself does not discharge the prisoner from the obligation of iron-bar service of the sentences. A violation of the parole conditions can result in his recommitment to iron-bar custody. The Superintendent in this case will confine Thacker on the sentences now attacked because of a 1964 parole revocation. (A. 5-6). In no sense then can it be said that to adjudicate presently the validity of these sentences is to resolve only an academic question—even if the present substantial impact of the sentences on the prisoner is disregarded.

Moreover, Rowe and Thacker can never be discharged totally from these unconstitutional sentences without some form of adjudication. If they are released from iron-bar custody and discharged from parole custody, the sentences will still play a part in the extent of their iron-bar custody if they ever are found to be in violation of the law again.

Rowe, for example, will be treated as a third rather than a second offender which in Virginia makes him liable to greatly increased punishment, VA. CODE ANN. § 53-296 (1967) and in other states to a life sentence. *E.g.*, COLO. REV. STAT. § 39-13-1 (1964). (Multiple offender statutes are collected and their impact analyzed in AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, SENTENCING ALTERNATIVES AND PROCEDURES 160-71 (Tent. draft 1967).)

These sentences will have other substantial impacts upon the prisoner if he is released into society. *Parker* v. *Ellis*, 362 U.S. 574, 577, 593-94 (1960) (dissenting opinion). See generally, Note, *Civil Disabilities of Felons*, 53 VA. L. REV. 403 (1967); PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE TASK FORCE CORRECTIONS 83-92 (1967). The removal of any or all of these disabilities will require judicial adjudication. *Ibid.*

The question is not whether an adjudication of the validity of these sentences will be necessary but when it should take place and the form it should take. For these two men now behind iron bars in the custody of the petitioner, the Great Writ is the present appropriate remedy.

Conclusion

Rowe and Thacker are prisoners in the custody of the Commonwealth of Virginia. They seek to attack present judgments upon which sentences they are not yet serving depend. These convictions have substantial adverse effects on them now. Unless a present remedy is provided, the sentences will have to be served while they are being attacked and the chances for success of an attack on them will

be materially reduced. Present treatment of Rowe and Thacker in the penal system is affected by these sentences no matter when they are scheduled to be served. Federal habeas corpus is available to vindicate their claims that their constitutional rights have been violated.

Their allegations if true show material violations of their right to due process. The need for an immediate determination of the validity of these convictions is apparent. The federal courts have the power under the Declaratory Judgment Act to make this determination even if habeas corpus is not available.

Rowe and Thacker respectfully request that the judgment of the Court of Appeals for the Fourth Circuit remanding their cases with instructions to determine the validity of the challenged sentences and judgments of conviction and, if they are found invalid, to remove the burdens of these sentences and judgments from them, be affirmed.

Respectfully submitted,

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APPENDIX

Federal Habeas Corpus Legislation

Judiciary Act of 1789, Chapter 20, 1 Stat. 81:

Sec. 14. *And be it further enacted*, That all the beforementioned courts of the United States, shall have power to issue writs of scire facias, habeas corpus, (c) and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. And either of the justices of the supreme court, as well as judges of the district courts, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of commitment: *Provided*, That writs of habeas corpus shall in no case extend to prisoners in gaol, unless where they are in custody under or by colour of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify.

Act of February 5, 1867, Chapter 28, 14 Stat. 385:

CHAP. XXVIII.—*An Act to amend "An Act to establish the Judicial Courts of the United States," approved September twenty-fourth, seventeen hundred and eighty-nine.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the several courts of the United States, and the several justices and judges of such courts, within their respective jurisdictions, in addition to the authority already conferred by law, shall have power to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the Constitution, or of any treaty or law of the United States; and it shall be lawful for such person so restrained of his or her liberty to apply to either of said justices or judges for a writ of habeas corpus, which application shall be in writ-